

HANDBOOK
ON THE
FORMATION, MANAGEMENT
AND
WINDING UP
OF
JOINT STOCK COMPANIES

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THE issue of the Thirty-Sixth Edition of this work under new Editorship gives occasion for a brief reference to the Bibliography set out on pages 769 to 771.

The first ten Editions were by the late Mr. RICHARD JORDAN. No copy of the First Edition appears to be extant, but the Second Edition, a copy of which is in the possession of the Publishers, is a modest little book of but forty-eight pages.

The Fourteenth to the Thirty-Third Editions (inclusive) of this work were produced by the late Sir FRANCIS GORE-BROWNE and the late Mr. WILLIAM JORDAN in collaboration, Sir FRANCIS GORE-BROWNE undertaking responsibility for the legal portion and Mr. WILLIAM JORDAN for that relating to the practice of the Registrar of Companies.

Under this very able and cordial co-operation the "Handbook" was greatly extended in its scope and usefulness, and attained a well-deserved reputation for fulness and accuracy.

In the present Edition I am assuming the responsibility which formerly rested upon Sir FRANCIS GORE-BROWNE, and to Mr. HERBERT W. JORDAN (son of Mr. WILLIAM JORDAN and nephew of Mr. RICHARD JORDAN) falls the duty of ensuring the accurate presentation of the practice of the Registrar, a task which he is eminently qualified to discharge.

In the course of the preparation of the present Edition the whole book has been carefully read, and such alterations and additions have been made as are necessary to bring the book up to date, in view of recent decisions and alterations in the practice of the Registrar of Companies.

There has been no new Companies Act since the last Edition, but a Committee is now sitting to consider what changes in the law of Companies appear desirable.

I have to thank my friend Mr. G. W. TOOKEY, of Gray's Inn, for a careful revision of the Index.

T. E. HAYDON.

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B & Ad.	-	-	Barnewall & Adolphus's Reports.
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C B	-	-	Common Bench Reports.
Ch	-	-	Chancery Appeals (Law Reports)
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BOOK I.

THE FORMATION AND CONSTITUTION OF A COMPANY.

CHAPTER I.

HOW TO FORM A JOINT STOCK COMPANY.

THE formation of Joint Stock Companies in England for trading and other purposes dates back several centuries. For example, the famous East India Company was formed in 1600, three years before the death of Queen Elizabeth; the New River Company in the early years of her successor, James I.; the Hudson's Bay Company in 1670; and the Bank of England in 1694. In those days such companies were incorporated either by Special Act of Parliament or by Royal Charter; but there existed also a number of bodies, such as would now be called "Companies," carrying on important businesses (*e.g.* banking and insurance), which were not incorporated, and in the eye of the law were only private partnerships. The law did not view such bodies with favour, and it was not till 1844 that companies could obtain incorporation otherwise than by Special Act or Royal Charter. In the same year provisions for the winding up of companies were first enacted.

Limited Liability could not be assumed by a company before 1855, and in 1856 the then existing Acts relating to Joint Stock Companies were repealed and a Codifying Law was passed, followed by an Amending Act in 1857. The law was again codified in 1862, and some sixteen amending Acts were passed during the succeeding forty-six years. These Acts, collectively known as "The Companies Acts, 1862 to 1908," were consolidated by The Companies (Consolidation) Act, 1908, to which certain amendments were made regarding Private Companies by The Companies Act, 1913, and as regards Foreign Interests and Particulars as to Directors by 7 & 8 Geo. V., Chapters 18 and 28 in 1917, and the four Acts are now cited as The Companies Acts, 1908 to 1917.

The Act of 1908, by Section 286 and the Sixth Schedule, repeals all the Companies Acts formerly in force, but expressly preserves the incorporation of any company registered under the repealed enactments, and keeps on foot Table B of the Act of 1856, Table A of the Act of 1862, and the Revised Table A

adopted by the Board of Trade in 1906, so far as they respectively form the Articles of Association of any existing company; the Act maintains in force the provisions of the Joint Stock Banks Acts, 1844 and 1857, specified in the Sixth Schedule, and by Sections 245 to 247 the provisions of the Act are made applicable to companies formed and registered under the Acts of 1856, 1857, and 1862, or registered but not formed under those Acts, including any company originally unlimited but registered under the Act of 1879 as a limited company, and the Act provides that any reference to the date of registration is to be construed as a reference to the date of registration under those Acts respectively.

By Section 291, "where any enactment repealed by this Act is mentioned or referred to in any document," that document is to be read as if the corresponding provision of the Act were mentioned or referred to and substituted for the repealed enactment.

In reference to the repeal, moreover, regard must be had to the provisions of The Interpretation Act, 1889, which are as follows:—

"Where . . . any Act . . . repeals and re-enacts, with or without modification, any provisions of a former Act, references in any other Act to the provisions so repealed shall, unless the contrary intention appears, be construed as references to the provisions so re-enacted.

"Where . . . any Act . . . repeals any other enactment, then, unless the contrary intention appears, the repeal shall not—

"(a) Revive anything not in force or existing at the time at which the repeal takes effect; or

"(b) Affect the previous operation of any enactment so repealed, or anything duly done or suffered under any enactment so repealed; or

"(c) Affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed¹; or

"(d) Affect any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment so repealed; or

"(e) Affect any investigation, legal proceeding, or remedy in respect of such right, privilege, obligation, liability, penalty, forfeiture, or punishment as aforesaid;

and any such investigation, legal proceeding, or remedy may be instituted, continued, or enforced, and any such penalty,

¹ Thus power under Section 15 to extend the time for registering debentures under Section 14 of The Companies Act, 1900, continues to exist, notwithstanding the repeal of the latter section (Herts and Essex Waterworks Co., [1900] W. N. 48; Lush & Co., [1913] W. N. 39); or a memorandum as to payment for shares in kind before 1901 can still be filed under the repealed Act of 1898 (Wilkinson Sword Co., [1913] W. N. 27).

forfeiture, or punishment may be imposed as if the repealing Act had not been passed.”¹

Wherever the expression “the Act” occurs in this book The Companies (Consolidation) Act, 1908, is meant, and the numbers of the Sections are those of that Act unless otherwise indicated by the context.

Besides The Companies Acts, 1908 to 1917, there are also a Limited Partnerships Act (1907), Friendly Societies Acts (1896 and 1908), Building Societies Acts (1874 to 1894), Industrial and Provident Societies Acts (1893 to 1913), and certain Statutes affecting banks, which are not within the scope of this book. The Stannaries Acts, 1869 and 1887, affect companies formed to work mines in the counties of Devon and Cornwall. The Assurance Companies Act, 1909, is specially dealt with in Chapter IV., page 54 *et seq.*, *infra*.

Companies constituted under Private Acts of Parliament have powers and duties defined by those Acts, which usually incorporate The Companies Clauses Consolidation Act, 1845; The Railway Clauses Consolidation Act, 1845; The Gasworks Clauses Act, 1847; or The Waterworks Clauses Act, 1847; according as their respective provisions fit the undertaking of each company. To such companies and societies this book does not apply, and when the word “company” is hereafter used it means, unless a contrary intention appears from the context, a company incorporated under the Companies Acts.

Lord Justice Lindley gives this definition of a company having a capital divided into shares: “I understand by a company—an unincorporated company—some association of members, the shares of which are transferable. As distinguished from a partnership, I know of nothing else except the transferability of shares.”² But with regard to an *incorporated* company there are other important distinctions: *e.g.* that, while in an ordinary partnership each partner is personally responsible for all the debts contracted by the firm, in an incorporated company the members have no individual liability to its creditors for debts owing by the company, and their personal liability is satisfied if they pay the calls properly made upon them by the company or its liquidator. These calls may be limited in amount or unlimited, according as the company is limited or unlimited, but they are enforceable only by the company or its liquidator. The company, moreover, is a distinct legal personality,³

¹ Interpretation Act, 1889, Section 38, Sub-sections 1 and 2.

² *Reg. v. Registrar of Joint Stock Companies*, [1891] 2 Q. B. at page 610.

³ Where a partnership of eight persons transferred their property to a company in exchange for shares in the same proportions as their interests in the partnership this was held to be a sale to a distinct person. “We have two parties, one party consisting of several individuals, and the other party consisting of a corporation.” *Per* Lindley, L. J. (*John Foster & Sons v. Commissioners of Inland Revenue*, [1894] 1 Q. B. at page 528).

and can own and deal with property, sue and be sued in its own name, and contract on its own behalf, and the members are not personally entitled to the benefits or liable for the burdens arising thereby: their rights are confined to receiving from the company their share of the profits, or, after a winding up, of the surplus assets, and their liabilities to paying the amounts specified as due from them to the company. The creditors of a limited company accordingly know that they cannot, as in the case of an ordinary partnership, look to the whole property of the individual members to pay them, but are restricted to the property of the company, including such further amounts (if any) as the members are liable to pay in respect of shares held by them in the capital, and in the case of Companies Limited by Guarantee the sums payable in accordance with the guarantee contained in the Memorandum of Association. The separate personality of a company and its entity as distinct from its shareholders was established by the House of Lords in *Salomon's case*,¹ where it was held that however large the proportion of the shares and debentures owned by one man, even if the other shares were held in trust for him, the company's acts were not his acts nor were its liabilities his liabilities; nor is it otherwise if he has sole control of its affairs as governing director.²

An incorporated company is a "person" within the meaning of Acts of Parliament unless the context shows that only a natural person is intended.³ But a company cannot be convicted under a section which inflicts only imprisonment and whipping as the penalty,⁴ nor can it be committed for trial on an indictment.⁵ But it can be fined for contempt of Court, although it cannot be attached,⁶ and it can be summoned under the Summary Jurisdiction Acts to answer an information for a penalty (*e.g.* as an occupier of a shop offending against The Shops Act, 1912,⁷) and may be convicted of offences where the punishment is a fine.⁸ A company may be "a respectable and responsible person" within the meaning of those words in a licence to assign leasehold property.⁹

¹ *Salomon v. Salomon & Co.*, [1897] App. Ca. 22.

² *Inland Revenue Commissioners v. Sanson*, [1921] 2 K. B. 492.

³ *Hirst v. West Riding Union Banking Co.*, [1901] 2 K. B. 500, Interpretation Act, 1880, Sections 2 and 19.

⁴ *Hawke v. E. Hulton & Co.*, [1909] 2 K. B. 93.

⁵ *Rex v. Daily Mirror Newspapers*, [1922] 2 K. B. 530.

⁶ *Rex v. J. G. Hammond & Co.*, [1914] 2 K. B. 806.

⁷ *Evans & Co. v. London County Council*, [1914] 3 K. B. 315.

⁸ *Pharmaceutical Society v. London and Provincial Supply Association*, [1880] 5 App. Ca. at p. 809; *Clunter v. Freeth*, [1911] 75 J. P. 430.

⁹ *Ideal Film Renting Co. v. Nielsen*, [1921] 1 Ch. 575; *Willmott v. London Road Car Co.*, [1910] 2 Ch. 525, overruling *Neville, J.*, [1910] 1 Ch. 754, and *Harrison Ainslie & Co. v. Barrow-in-Furness Corporation*, [1891] 63 L. T. 834.

No company, association, or partnership consisting of more than ten persons may be formed for the purpose of carrying on banking business, and no company, association, or partnership consisting of more than twenty persons may be formed for the purpose of carrying on any other business¹ that has for its object the acquisition of gain, unless registered under the Companies Acts or formed in pursuance of some other Act of Parliament or of Letters Patent, or is a company engaged in working mines in the Stannaries and subject to the jurisdiction of the Stannaries Court² (Consolidation Act, 1908, Section 1).

Any seven or more persons (or in the case of a Private Company any two or more persons), whether British subjects or foreigners,³ may, for any lawful purpose,⁴ form an incorporated company, which may be one of five kinds: viz. —(1) A Company with its Liability Limited by Shares; (2) A Company with its Liability Limited by Guarantee and not having a Share Capital; (3) A Company with its Liability Limited by Guarantee and having a Share Capital; (4) A Company with Unlimited Liability and having a Share Capital; or (5) A Company with Unlimited Liability and not having a Share Capital (Consolidation Act, Sections 2–5)

¹ Prior to The Dentists Act, 1921 (11 & 12 Geo. 5 c. 21), it was held that two or more persons could not be incorporated as a company under a name including the word "Dentist" or implying that it possessed dental qualifications, for the word "Dentist" meant a dentist registered under The Dentists Act, 1878, and a company could not be registered under that Act (*Rowell v. Registrar of Joint Stock Companies for Ireland*, [1904] 2 Ir. R. 634. But the name "United Dental Service, Limited" was held lawful in *Re v. Registrar of Joint Stock Companies*, [1914] 3 K. B. 1161). The Dentists Act, 1921, expressly authorises a body corporate to carry on the business of dentistry (subject to certain conditions) if it carries on no other business and if a majority of the directors and all the operating staff thereof are registered dentists. This necessarily implies that a company may be incorporated for the purpose of carrying on dentistry as its business, but any body corporate not complying with the terms of that Act is prohibited from carrying on dentistry.

² The Stannaries jurisdiction only applies to metalliferous mines, and the exception referred to in the text does not therefore apply to companies of more than twenty persons working china-clay or other non-metallic substances.

³ General Company for the Promotion of Land Credit, [1870] 5 Ch. 363. It would appear from this case that if the subscribers and directors are all foreigners, the Memorandum and Articles should show that some kind of management and business in England is contemplated.

⁴ A Trade Union may not be registered under the Companies Acts (Trade Union, Act, 1871, Section 5), and any such registration is void. "The term 'Trade Union' means any combination, whether temporary or permanent, the principal objects of which are under its constitution, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business" (Trade Union Act Amendment Act, 1876, Section 16, as amended by The Trade Union Act, 1913, Section 2, which added the words in italics). The last part of this definition includes objects which many Trade Protection Societies have in view. In *Edinburgh and District Aerated Water Manufacturers Defence Association v. Jenkinson*, [1904] 5 F. 1159, Court of Session, the registration of the plaintiff association as a company was held void, and its action failed, on the ground that it was an unincorporated company. But the fact that in its Memorandum are powers falling within the above definition does not alone constitute the Company a Trade Union (*British Association of Glass Bottle Manufacturers v. Nettlefold*, [1911] 27 T. L. R. 527).

one pound per cent. of the entire nominal capital has to be paid,¹ and the other documents described on page 36, *infra*, and if there are special Articles also the Articles of Association: see page 42, *infra*) must then be lodged at the Companies Registration Office in London² or Edinburgh, or Belfast or Dublin, according to the part of Great Britain or Ireland in which the Registered Office of the company is to be situate, accompanied by a statutory declaration by a solicitor engaged in the formation of the company, or by a person named in the Articles as a director or secretary,³ that the requirements of the Act have been complied with (Section 17, Sub-section 2). If everything is in order, a Certificate to the effect that the company has been incorporated under The Companies Acts, 1908 to 1917, and in the case of a limited company "that the company is limited," is issued by the Registrar (Section 16, Sub-section 1) on the second or third day after that on which the papers are lodged.

"A Certificate of Incorporation given by the Registrar in respect of any association shall be conclusive evidence that all the requirements of this Act in respect of registration *and of matters precedent and incidental thereto* have been complied with, *and that the association is a company authorised to be registered and duly registered under this Act*" (Section 17, Sub-section 1, following the Act of 1900, Section 1, Sub-section 1). The words in italics were added in 1900, and it may now be taken that the Certificate of Incorporation is conclusive evidence that there is a company, and that it is duly incorporated,⁴ thus remedying the inconvenience caused by the wording of Section 18 of the Act of 1862, which was held not to cover a case where less than seven persons had signed the Memorandum of Association, and the doubts in cases where some of the signatories were infants.⁵ The Certificate is also

¹ For Table of Duties and Fees to be paid on Registering a Company see Appendix B.

² Companies formed to work mines "within and subject to the jurisdiction of the Stannaries" (that is, metalliferous mines in the counties of Devon and Cornwall) are subject to the Stannaries Acts. Such companies might formerly be registered either in London or Truro; but the Truro office was abolished by order of the Board of Trade dated the 22nd March, 1897. The prohibition against forming a company otherwise than under the Companies Acts does not apply to companies formed for working such mines in the Stannaries: consequently such companies may still be formed and carried on under what is known as "the Cost Book System" (see page 81, *infra*).

³ In the case of a company which had no solicitor and no Articles of Association the subscribers to the Memorandum of Association were, by Clause 53 of the old Table A (1862), "deemed to be directors," and a declaration made by one of them was accepted by the Registrar. The Revised Table A (1906) and Table A of 1908 do not contain such a clause.

⁴ *Hammond v. Prentice Brothers*, [1920] 1 Ch. 201.

⁵ See *National Debenture and Assets Corporation*, [1891] 2 Ch. 505; *W. Laxon & Co.* No. 2, [1892] 3 Ch. 555.

conclusive evidence that the registration and incorporation of the company were duly effected on the day mentioned in the Certificate.

The date mentioned in the Certificate is the first day of the company's existence, and the company is deemed to have been incorporated on the first moment of that day.¹

The procedure on incorporation is for the Memorandum and Articles and other papers to be lodged with the Registrar of Companies, and after a provisional official examination for the duty and fees to be paid. A second official examination takes place two or three days later, and if no impediment to registration is found the Certificate is issued. It is the Registrar's practice to insert in the Certificate the date of the second official day succeeding the date on which the duty and fees are paid. The practice formerly was for the Certificate to be dated the day on which the duty and fees were paid; but this practice was varied as from the 18th August, 1924.

Section 17, however, only deals with ministerial acts, and it was held that a Certificate did not establish the fact that the company is not a Trade Union and therefore incapable of registration.² The House of Lords has held that the Certificate of the Registrar is conclusive that the terms of the Memorandum are within the law, and that accordingly the Court's only function is to construe the Memorandum as it stands.³ The conclusiveness of the Certificate was also discussed in the House of Lords in another case in connection with objects which were alleged to be illegal.⁴ The section of the Act of 1900 applied to all Certificates of Incorporation, whether given before or after the passing of the Act (Section 1, Sub-section 4).

"From the date of incorporation mentioned in the Certificate of Incorporation the subscribers of the Memorandum, together with such other persons as may from time to time become members of the company, shall be a body corporate by the name contained in the Memorandum, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, with power to hold lands,⁵ but

¹ *Jubilee Cotton Mills, in re*, [1923] 1 Ch. 1; [1924] A. C. 958.

² *Edinburgh and District Aerated Water Manufacturers Defence Association v. Jenkinson*, [1904] 5 F. 1159; *British Association of Glass Bottle Manufacturers v. Nettlefold*, [1911] 27 T. L. R. 527. Whether a Certificate of Incorporation is conclusive when a Friendly Society purports to register as a company but adopts an extended Memorandum or otherwise offends against the law is left open in *Blythe v. Butley*, [1910] 1 Ch. 228.

³ *Cotman v. Brougham*, [1918] App. Ca. 514.

⁴ *Howman v. Secular Society, Limited*, [1917] App. Ca. 106.

⁵ These words exclude the effect of the Mortmain Acts. A company formed for the purpose of promoting art, science, religion, charity, or any other like object, not involving the acquisition of gain, may not hold more than two acres without the sanction of the Board of Trade (Section 19).

with such liability on the part of the members to contribute to the assets of the company in the event of the same being wound up as is mentioned in this Act"¹ (Section 16, Sub-section 2).

A company thus incorporated is not a company "incorporated by Act of Parliament" within the meaning of those words when used in investment clauses.²

Section 243, Sub-section 6, enacts that any person may inspect the documents kept by the Registrar on payment of one shilling, and may require the Registrar to issue a Certificate of the Incorporation of any company or a copy of or extract from any other document on payment of five shillings for the Certificate of Incorporation or fourpence a folio for a copy or extract, or in Scotland for each sheet of two hundred words. Any person may require such a copy or extract to be certified by the Registrar on payment of one shilling; and Sub-section 7 provides that a copy of or extract from any document kept and registered at any of the offices for registration, so certified to be a true copy under the hand of the Registrar or an Assistant Registrar, shall in all legal proceedings be admissible in evidence as of equal validity with the original document. Emergencies frequently occur when an additional Certificate is required in legal proceedings or for use abroad.³

Companies incorporated under the Companies Acts can hold land notwithstanding the Mortmain Acts, with the limitations in regard to companies not using the word "Limited" mentioned on page 79, *infra*. By Section 275 the same power to hold land is given to any company incorporated in a British Possession which files the documents and particulars required in the case of foreign and colonial companies (see page 460, *infra*).

¹ See Section 123, set out on pages 21 and 22, *infra*.

² *Re Smith, Davidson v. Myrtle*, [1896] 2 Ch. 591.

³ Where a Certificate or other document is required for use abroad it is generally necessary for the Registrar's signature to be authenticated by a notarial certificate, and for the documents to be "legalised" by the Consul of the country where they are to be used.

CHAPTER II.

THE MEMORANDUM OF ASSOCIATION.

THE registration of the Memorandum of Association (after having been duly subscribed) being the formal creation of the company, the contents of that document are now dealt with more fully.

1. THE NAME OF THE COMPANY.

Except in the cases of Unlimited Companies and Associations Not for Profit incorporated under Licence of the Board of Trade, the word "Limited" must be the last word in the company's name. An abbreviation of the word (such, for instance, as "Ld." or "Ltd.") should not be used, as it is not a compliance with the Act; and the word must therefore be given in full in the Memorandum of Association: *e.g.* "The Name of the Company is THE EASTERN STEAM PACKET COMPANY, LIMITED."

Any person or persons not duly incorporated¹ with limited liability who trade or carry on business under any name or title of which "Limited" is the last word are liable to a penalty not exceeding five pounds a day (Section 282).

In settling the title, care must be taken that it is not identical with that of any existing company, or so nearly resembling it as to be calculated to deceive (Section 8, Sub-section 1).² But if by inadvertence a company is registered with a name identical with or too closely resembling that of an existing company, the first-mentioned company may, with the sanction of the Registrar, change its name (Section 8, Sub-section 2). A company cannot be registered with a name identical with that of an existing one, although the purposes for which it is formed may be totally different, and the scene of its operations in a different part of the world.³ Further, a company formed for the purpose of carrying on a business similar to that of an existing firm has no right of registration under a name closely resembling that of the firm, even if the proposed name is that of a person identified with the company. For example,

¹ A company incorporated abroad may use the word "Limited," but is subject to the provisions of Section 274, Sub-section 4 (see page 460, *infra*).

² *Avory, J.*, has said that the Registrar has a discretion in accepting or rejecting a name (*Rex v. Registrar of Companies*, [1912] 3 K. B. 23). There is no other authority for this proposition, and it is difficult to see on what it is based. The Court in this case held that "The Water Softening Materials Company (Sofnol), Limited," too closely resembled "Water Softeners, Limited," to be allowed. The sound as well as the spelling are material, thus "Ouvah Ceylon Estates, Limited," and "Uva Ceylon Rubber Estates, Limited," were held to be too much alike (1910, 27 Rep. Pat. (Cas. 753).

³ But if the name is distinct and the business different it is no objection that one of the principal names is identical (*Dunlop Pneumatic Tyre Co. v. Dunlop Motor Co.*, [1907] App. Ca. 430).

Madame Tussaud & Sons, Limited, obtained an injunction restraining **Louis J. K. Tussaud** from registering a waxworks exhibition under the name of "**Louis Tussaud, Limited**,"¹ for although a man acting in good faith may trade in his own name notwithstanding the fact that it closely resembles the name of another trader or company,² he may not, if he has never used his name in carrying on business on his own account or in partnership with others, register a company in such name, so as to create confusion and mislead the public into the belief that there is some connection between the two businesses.³

A company must not take such a name as will lead to the belief that it is carrying on the business of an existing firm, British or Foreign⁴; for, even after the name has been placed upon the Register, the company and its members may be restrained from allowing the company to remain registered under the offending name,⁵ and the Court may also grant other injunctions in such form as to make the use of the name nearly impossible. Thus, **Messrs. Huntley & Palmer** procured an injunction restraining the **Reading Biscuit Company, Limited**, from using the word "**Reading**" as descriptive of or in connection with its biscuits without clearly distinguishing them from the plaintiffs' biscuits⁶; and the sound as well as the spelling of the name must be considered.⁶ Moreover, if the name of the new company may lead to the assumption that it has absorbed an existing company this will be ground for an injunction.⁷ Where, however, one company carried on only Marine Insurance business, and another General but not Marine Insurance, an injunction was refused in Scotland on the ground that no confusion was likely to arise.⁸

Names which have been held to be infringements of the rights of existing companies will be found in the foregoing

¹ *Madame Tussaud & Sons v. Tussaud*, [1890] 14 Ch. D. 678.

² *Turton v. Turton*, [1889] 12 Ch. D. 198. A man may not, however, use even his own name if his object is fraudulent (*Croft v. Dy*, [1843] 7 Beav. 81).

³ *Fine Cotton Spinners' Association v. Harwood, Cash & Co.*, [1907] 2 Ch. 181; *Harrods, Limited, v. R. Harrod, Limited*, [1921] 40 T. L. R. 105.

⁴ *Societe Anonyme des Anciens Etablissements Panhard et Levassor v. Panhard Levassor Motor Co.*, [1901] 2 Ch. 513. *Daimler Motor Co. v. London Daimler Co.*, *Times*, 16th April, 1907, *Mercantile Investment and General Trust v. Mercantile and General Trust*, *Times*, 27th Feb., 1909, *Standard Bank of South Africa v. Standard Bank*, [1909] 26 T. L. R. 120.

⁵ *Huntley & Palmer v. Reading Biscuit Co.*, [1902] 9 T. L. R. 402; compare *Montgomery v. Thomson*, [1901] App. Ca. 217. *John Brinsmead & Sons* obtained an injunction restraining *Thomas Edward Brinsmead & Sons, Limited*, from selling pianos without a statement that they were not those of the plaintiff firm (Court of Appeal, 26th October, 1896).

⁶ *Ouvah Ceylon Estates, Limited v. Uva Ceylon Rubber Estates, Limited*, [1910] 27 Rep. Pat. Cas. 753. The matter is to be decided "on the view" (same case at page 756).

⁷ *Manchester Brewery Co. v. North Cheshire & Manchester Brewery Co.*, [1899] App. Ca. 83.

⁸ *Scottish Union and National Insurance Co. v. Scottish National Insurance Co.*, [1909] S. C. 318 Court of Sess.

notes, but the following names have been allowed to co-exist:—London and Provincial Law Assurance Society with London and Provincial Joint Stock Life Assurance Company¹; London Assurance Corporation with London and Westminster Assurance Corporation²; Colonial Life Assurance Co. with Home and Colonial Assurance Co.³; London and County Banking Co. with Capital and Counties Bank.⁴ But, as noted above, the Manchester Brewery Co. obtained an injunction against the North Cheshire and Manchester Brewery Co. on the ground that the latter might be considered to have absorbed the former.⁵ The question is in each case one of the fact whether confusion has arisen or will arise. Other cases where protection has been given to a trade name may be compared for the purpose of considering the principle: "Stone Ales,"⁶ "Charbonnel and Walker,"⁷ "Thorley's Food for Cattle,"⁸ "Camel Hair Belting."⁹

Protection will be given to an existing company even in respect of a name which it is using in a manner contrary to the provisions of Sections 41 and 42 of 1862 or Section 63 of 1908.¹⁰

But a company cannot appropriate a descriptive word or title so as to obtain a monopoly of it,¹¹ even when the word is a fancy word whose use is brought in by the complaining company.¹²

The name is important, moreover, as indicating to some extent the objects of the company.¹³ In a case where the name stated a company to be a bank, North, J., took that fact into consideration in determining whether it ought to be wound up on the ground that it had ceased to carry on its principal business.¹⁴ When alterations of the objects of a company are sanctioned, it is not infrequently one of the terms of the Court's approval that the name shall be altered in a corresponding manner.¹⁵

¹ [1848] 17 L. J. Ch. 37.

² [1863] 32 L. J. Ch. 661.

³ [1864] 33 Beav. 518, 33 L. J. Ch. 741.

⁴ [1874] 9 Ch. D. 567.

⁵ [1899] App. Ch. 83.

⁶ *Montgomery v. Thomson*, [1891] App. Ch. 217.

⁷ *Levy v. Walker*, [1878] 10 Ch. D. 436.

⁸ *Thorley's Cattle Food Co. v. Mussum*, [1890] 14 Ch. D. 748.

⁹ *Reddaway v. Bunham*, [1896] App. Ch. 190.

¹⁰ *Pearks, Gunston & Tee v. Thomson, Taling & Co.*, [1900] 18 Rep. Pat. Ch. 185; *H. E. Randall, Limited v. British and American Shoe Co.*, [1902] 2 Ch. 351.

¹¹ *Aerators, Limited v. Tolitt*, [1902] 2 Ch. 319, where it was held that the plaintiff company could not prevent the registration of Automatic Aerators Patent Co. The *Electromobile Co.* also failed to restrain the *British Electromobile Co.* from trading in that name (1908, 98 L. T. 259), and the *Trade Extension Co.* failed against the *Expansion of Trade, Limited*, [1909] 54 S. J. 101.

¹² *British Vacuum Cleaner Co. v. New Vacuum Cleaner Co.*, [1907] 2 Ch. 312. In this case the plaintiff company was forming subsidiary companies using the words "Vacuum Cleaner," which was another ground for refusing relief. See also *Electromobile Co. v. British Electromobile Co.*, [1907] 23 Times L. R. 631.

¹³ *Re Crown Bank*, [1890] 44 Ch. D. 634; and see *Coolgarrie Consolidated Gold Mines*, [1897] 76 L. T. 269; and *Cotman v. Brougham*, [1918] App. Ch. 514.

¹⁴ *Re Crown Bank*, [1890] 44 Ch. D. 634.

¹⁵ *Foreign and Colonial Government Trust Co.*, [1891] 2 Ch. 395; *Oriental Telephone Co.*, [1891] W. N. 153; and see cases cited at page 40, *infra*.

"Royal," "Imperial," "King," "Queen," "Emperor," "Empress," "Crown," and similar words are also inadmissible as part of the names of new companies without the written consent of the Home Secretary. In cases, however, where it is of importance that either of those words should form part of the name (as, for example, where an old-established "Royal" or "Imperial" Hotel is being converted into a company) the sanction of the Home Secretary may usually be obtained if cogent reasons are placed before him. Thus, in December, 1901, consent was given to the registration of the Imperial Tobacco Company, Limited—a company, with a capital of £15,000,000, formed to protect the interests of the British tobacco industry against the competition of an American Tobacco Trust. By the Geneva Convention Act, 1911, the use of the words "Red Cross" or "Geneva Cross" may not be used for the purpose of any trade or business, and must therefore not form part of a trading company's name, and a special Act protects the word "Anzac" from use in connection with any trade, business, calling, or profession without the consent of a Secretary of State given on the request of the Government of Australia or New Zealand.¹

A company cannot be registered under a name which seems to imply that it has a connection with the Government. For example, the name of "The National Old Age Pensions Trust" was rejected shortly before the passing of The Old Age Pensions Act, 1908.

Although a *bona fide* bank is exempted from the provisions of The Moneylenders Act, 1900, a moneylender cannot be registered under that Act under any name including the word "Bank" or implying that he carries on banking business (Moneylenders Act, 1911, Section 2). A company formed for the purpose of money-lending not being a genuine bank must therefore avoid the use of the words "Bank," or "Banking Company."

When a company has resolved to wind up, and a new company is to be formed to carry on the business under the same or a similar name without waiting until the old company's name is removed from the Register, it is necessary first to register the resolution putting the old company into liquidation and file a notice of the appointment of the liquidator, and then to obtain and register the consent of the old company to the registration of the new company under the name of the old one. This consent has to be given on the prescribed form, which must be signed by the liquidator, impressed with a five-shilling registration fee stamp, and filed with the Registrar of Joint Stock Companies (Section 8, Sub-section 1). Until the old company has actually gone into liquidation, and the fact has been recorded at the Registry, the consent cannot be accepted by the Registrar; but in

¹ Anzac Act, [1916] 6 & 7 Geo. 5, c. 51.

cases where it is not desired that the existing company should first go into liquidation the Registrar will allow the new company to be registered forthwith if (a) its name is identical with that of the old company, with the addition only of the year of incorporation, (b) the Memorandum of Association of the new company shows that its principal object is to acquire the undertaking of the existing company, (c) the contract of sale whereby the old company agrees to sell its undertaking to the new company or the draft thereof is produced to the Registrar, and (d) the existing company gives its consent under seal to the registration of the new company with the proposed title, and undertakes to confirm within the prescribed period a special resolution for winding up which has already been passed by the requisite majority. This latter requirement is in special circumstances waived by the Registrar if an undertaking is given by the existing company to go into liquidation within two months of the registration of the new company.

Every company must have its name painted or affixed, "in letters easily legible," in a conspicuous position on the *outside* of every office or place wherein it carries on business. Its name must also be "engraved in legible characters" on its seal, and appear "in all notices, advertisements, and other official publications of the company, and in all bills of exchange, promissory notes, endorsements, cheques, and orders for money or goods purporting to be signed by or on behalf of the company, and in all bills of parcels, invoices, receipts, and letters of credit of the company" (Section 63, Sub-section 1). The penalty for not publishing the name of a company as required is five pounds for every day during which its name is not so kept painted or affixed, and every director or manager knowingly and wilfully permitting the default is liable to the same penalty (Section 63, Sub-section 2).¹

Any director, manager, or officer of a company using or authorising the use of a seal purporting to be the seal of the company whereon its name is not so engraved, or issuing or authorising the issue of any document of the company wherein its name is not mentioned in manner aforesaid, is liable to a penalty of fifty pounds, and is also personally liable to the holder of any such bill of exchange, promissory note, cheque, or order for money or goods for the amount thereof, unless the same is duly paid by the company (Section 63, Sub-section 3).² In the case of an order for goods, the "holder"

¹ On the 6th March, 1902, the managing director of the American Slate Mart and Wharf Co., Limited, was fined £50 and £26 10s. costs for omitting to have the name of the company painted on the outside of the company's premises.

² In *Penrose v. Martyn*, [1858] E. B. & E. 490, which was decided upon a similarly worded clause in the Act of 1856, the secretary, who had accepted on behalf of the company a bill directed to the company, in which the word "Limited" as part of its name was omitted was held personally liable on the bill, the same not having been paid by the company.

to whom the person signing is made liable by this Section is the person to whom the order is given.¹

The name of a company should be correctly given in every detail. In the case of *Atkins v. Wardle*² it was decided that the directors of a company were personally liable for the amount of a bill of exchange accepted by them as directors of the company, because, although the word "Limited" appeared in the bill in one place, the name of the company was not correctly given in either the draft or the acceptance.

In another case, where a bill contained more than the correct name, the directors were held personally liable,³ but they escaped where the name of the company had been impressed with a rubber stamp and the word "Limited" had overlapped, and did not appear on the bill,⁴ and the use of the abbreviation "Ltd." was held not to render the statement of the name incorrect.⁵

In petitioning for the winding up of a company it is important to state correctly the name of the company. Even slight errors will render it necessary for the petition to be amended, re-served, re-advertised, and again brought before the Court.⁶

2. THE REGISTERED OFFICE.

This clause must be stated thus: "The Registered Office of the Company will be situate in England" or "Scotland," or "Northern Ireland" or "the Irish Free State," as the case may be.⁷ Nothing beyond the above may be given in this clause of the Memorandum of Association, as the full address (that is, the number of the premises, the name of the street or road, and the town and county) must be stated in another document—the Notice of the Situation of the Registered Office of the company (Section 62, Sub-section 2)

Every company must have a registered office, "to which all communications and notices may be addressed" (Section 62, Sub-section 1), and any writ, notice, summons, or order is well served if left at or sent by post to such registered office (Section 116); but service of a summons at any other place,

¹ *Civil Service Co-operative Society v. Chapman*, [1914] W. N. 369, 30 T. L. R. 679.

² [1889] 58 L. J. Q. B. 377, 61 L. T. 23, and, on appeal, 5 Times L. R. 734.

³ *Nassau Steam Press v. Toler*, [1911] 70 L. T. 376.

⁴ *Derrnattine Co. v. Ashworth*, [1905] 21 T. L. R. 510.

⁵ *F. Stacey & Co. v. Wallis*, [1912] 106 L. T. 544, 28 T. L. R. 209.

⁶ *Re The Samuel Birch Co., Limited*, [1907] W. N. 31. And see pages 488 and 489, *infra*.

⁷ In cases where a company is intended to carry on business in Wales, Articles have sometimes been drawn with this clause reading, "The Registered Office of the Company will be situate in *Wales*." As, however, Wales is deemed to be part of England, this variation is inadmissible for (1) it is not recognised by the Act, and (2) it may place a bar to the company removing its office into England if it should ever be desirable to do so. The Statute does not permit any alteration in the Memorandum of Association in this respect.

even if the company carry on business there, is insufficient.¹ Any company which carries on business without having registered the situation of its office, or any change thereof, is liable to a penalty of five pounds for every day during which business is so carried on (Section 62, Sub-section 3). As to foreign and colonial companies see page 460, *infra*.

If, however, a company has no registered office, service of notices, writs, and petitions may be effected at an unregistered office.² But in the case of petitions to wind up application should be made to the Court for directions as to service.

The exact meaning of the words "carries on business," which are contained in Section 62, Sub-section 3, is doubtful; but the same section expressly says that "*every* company *shall* have a registered office," and for this purpose "carrying on business" seems to include issuing prospectuses, receiving applications for and allotting shares, and other preliminary matters.³ A company should therefore register the situation of its office at the time the Memorandum of Association is registered, and alter it afterwards if necessary. Notice of the situation of the registered office, and of any change⁴ therein, must be given to the Registrar and recorded by him (Section 62, Sub-section 2).

3. THE OBJECTS OF THE COMPANY.

The Objects clause being the most important part of the Memorandum, great care should be taken that the objects of the company (*i.e.* the trade or business which it is formed to carry on) are stated in the fullest and clearest manner possible, as the company cannot legally undertake any business not authorised by its Memorandum,⁵ and even the fullest sanction given by the shareholders will not make valid any act which is outside the powers of the company.⁶ Directors undertaking any such business may become personally liable for loss, and the greatest inconvenience follows from companies having too limited powers. It is, indeed, customary to insert some general

¹ *Pearks, Gunston & Teo v. Richardson*, [1902] 1 K. B. 91.

² *British and Foreign Gas Generating Apparatus Co.*, [1865] 13 W. R. 649, 12 L. T. 368; *Fortune Copper Mining Co.*, [1871] 10 Eq. 390.

³ Since the Act of 1900 in any case where a company issues a prospectus to the public it may not commence business or borrow money until certain requirements are complied with. It can scarcely "carry on" business before it "commences" business; but it is allowed to issue its prospectus and make provisional contracts before that date.

⁴ The Registrar accepts any notice of change which appears to be in order. Sometimes, when there is a dispute as to who are the directors of a company, difficulties arise as to conflicting notices given by the rival bodies. There is no provision showing what is the effect of an unauthorised notice given and actually recorded by the Registrar.

⁵ During the war, however, any company, notwithstanding anything contained in its Memorandum, could carry on "munitions work" (Munitions of War Act, 1915, Section 16, and Munitions of War (Amendment) Act, 1916, Section 9).

⁶ See *Ashbury Railway Carriage Co. v. Riche*, [1875] L. R. 7 H. L. 653; *Attorney-General v. Great Eastern Railway Co.*, [1880] 5 App. Cas. 473.

words, such as "To do all such other things as may be deemed incidental or conducive to the attainment of the above objects or any of them." It must, however, be understood that in the Courts such words will only be held to cover operations of a nature similar to the businesses previously mentioned, and will not include any wholly fresh business,¹ and, moreover, wide powers given in general words will be construed as merely ancillary to the specific objects mentioned in the early paragraphs,² unless there is a provision that each clause is to be read separately and not limited by other paragraphs, for it was held that where there is such a provision express powers given in the Memorandum cannot be ignored even though they are very numerous and various.³ The limits of the powers of a company' and the effect of acts done outside such powers are considered in Book II., Chapter III., page 379, *infra*.

It was at one time not uncommon to insert such words as "To do any other business which the company may from time to time determine"; but this form is objectionable, and, even if passed by the Registrar, would probably be held of no effect, not being a statement of what the objects of the company are. Accordingly it is desirable that the Memorandum should specifically enumerate all the businesses that the company is likely to undertake. For instance, a mining company should take power to construct railways, tramways, and canals, and not only to use them itself, but to let them out to others; and almost every company may with advantage take powers to acquire lands' and build offices or works, and to dispose of them. Similarly, a company which lends money on mortgage should have power to develop and turn to account or improve any lands that may come into its possession.

What is to be stated in the Memorandum is the "objects" of the company, and not the "powers" under which those objects are to be carried out. The reason for requiring the statement of the objects is twofold: first, to enable the members to know in what class of business their contributions are to be utilised, and, secondly, to enable persons having dealings with the company to know whether they may safely contract with it, without fear of the transaction being held to be *ultra vires* the company.⁴ As explained elsewhere, a company has, without express statement thereof, all powers necessary for carrying

¹ London Financial Association v. Kelk, [1881] 26 Ch. D. 107.

² German Date Coffee Co., [1882] 20 Ch. D. 169.

³ Anglo-Cuban Oil Co., [1917] 1 Ch. 477; affirmed in the House of Lords *sub nom.* Cotman v. Brougham, [1918] App. Ca. 514, where the House held that the Certificate of the Registrar was conclusive that the Act had been complied with, but commented adversely on the multiplicity of powers taken. This overrules Stephens v. Mysore Reets (Kangundy) Mining Co., [1902] 1 Ch. 745.

⁴ Cotman v. Brougham, [1918] App. Ca. 514.

into effect its objects, but questions often arise as to whether a particular power is so far incidental to or necessary for carrying out its objects as to be implied, and it has become customary to set out at great length in the Memorandum all the powers which it is thought the company can possibly desire to use. This is not the proper function of the Memorandum, and it has been suggested in the House of Lords that the Registrar of Companies might refuse to accept a Memorandum on the ground that such a multifarious enumeration of objects and powers as is now common is a misuse of the provisions of the Act.¹ This course has not been taken by the Registrar, and it was held in the case last cited that if the Memorandum, stating that each clause is to be read separately and not limited by reference to other clauses, has been accepted and registered it is conclusive that the company has all the powers set forth in the Memorandum, however dissimilar they may be from what appears to be the main object of the company. The question of how far the Memorandum is conclusive as to the legality of objects having regard to the Common Law has been discussed but not satisfactorily determined.¹

There are some objects which must not be included in the Memorandum of Association, or must be excluded either expressly or by implication; for example, a Shipping Company must not take power to run its vessels under a foreign flag. Before 1921 a company could not be incorporated with a name implying that it practised Dentistry, because none but registered dentists might do that,² but under The Dentists Act, 1921, Section 5, a body corporate may carry on the business of dentistry provided it does not carry on in addition any business other than a business ancillary to dentistry and that a majority of the directors and all the operating staff are registered dentists; in the case of such a company, therefore, the Memorandum must specify only dentistry and ancillary businesses as objects. A company taking general powers to effect insurances or re-insurances must, unless prepared to make the necessary deposits, specially negative the classes of assurance dealt with in The Assurance Companies Act, 1909, and The Industrial Assurance Act, 1923 (*i.e.* Life, Fire, Accident, Employers' Liability, and Bond Investment business), or words to the following effect must appear as a separate paragraph at the end of the Objects clause of the

¹ *Bowman v. Secular Society, Limited*, [1917] App. Cas. 406.

² *Rowell v. Registrar of Joint Stock Companies for Ireland*, [1904] 2 Ir. R. 634. *Attorney-General v. George Smith, Limited*, [1900] 2 Ch. 524, where an injunction was granted restraining the company from taking any name implying that it was registered under The Dentists Act, 1878. On the other hand "*United Public Dental Service, Limited*," was allowed in *Rex v. Registrar of Joint Stock Companies*, [1914] 3 K. B. 1101.

Memorandum :—"Provided that nothing herein contained shall empower the company to carry on the business of assurance or to grant annuities within the meaning of The Assurance Companies Act, 1909, as extended by The Industrial Assurance Act, 1923, or to re-insure any risks under any class of assurance business to which those Acts apply." The Registrar requires that any sub-clause of the Memorandum containing general power to transact re-insurance business shall be made specifically subject to this proviso. If that is not done, the company cannot be incorporated until an office copy of the "Certificate of Lodgment" of the necessary deposits with the Paymaster-General of the Chancery Division is produced for filing with the other necessary papers at the Registry. (As to Assurance Companies see Chapter IV., page 54 *et seq.*, *infra*.)

Under Section 9 the Memorandum can, with the sanction of the Court, be altered as regards its objects; but this right is subject to many limitations, causing much trouble and expense, and the necessity of making use of it should be avoided if possible. These alterations and the extent to which they can be made are considered at pages 38 to 41, *infra*.

4. THE LIABILITY OF THE MEMBERS.

In Companies Limited by Shares or by Guarantee the fourth clause must simply state that "The Liability of the Members is Limited." Those are the words contained in the forms given in the Third Schedule to the Act, and they should not be departed from. It is wrong to insert, as has been done, "The Liability of the Company is Limited." Such a variation, if passed by the Registrar, might produce results disastrous to the members.

In Companies Limited by Guarantee formed under the old Acts the Memorandum contained no such clause, and there is of course no corresponding clause in the Memorandum of a Company with Unlimited Liability.

The most usual course is to frame the Memorandum of Association so as to limit the liability of each member or shareholder to the amount of the shares held by him; the meaning of which is that at no time can he be called upon to pay, either for the purpose of carrying on the company's business or of satisfying the claims of its creditors, a larger sum than remains unpaid on the shares which at the time of the call, or within a year before the commencement of the winding up of the company, were registered in his name.¹ For example, if a member hold five shares of ten pounds each, his utmost liability is fifty pounds. When he has paid a part, the

¹ There is an exception, however, with regard to the liability of members of banking companies having power to issue bank notes. The liability of the shareholders in respect to these is unlimited (Act of 1879, Section 6, Act of 1908, Section 251). See page 70, *infra*. There are no private banks in England and Wales that now possess note-issuing powers.

balance only can be recovered from him. Should he transfer his shares before the full amount is called up, his unsatisfied liability passes to the person who acquires them; but a contingent liability still attaches to the original holder to the limited extent that, if the company should go into liquidation within one year from the time of his parting with his shares, he may be called upon to contribute towards the payment of any debts contracted before he ceased to be a member, in the event of the existing members being unable to meet the liabilities of the company, and the person who has acquired his shares failing to pay up the amount of the shares in full.

Under the provisions of Sections 60 and 61, however, the directors or managers may take upon themselves an unlimited liability, although the liability of the other members is limited, this being similar to the distinction between general and limited partners under The Limited Partnerships Act, 1907.

The second way of limiting the liability of members is by so framing the Memorandum of Association as to make each member guarantee a certain sum, which he can only be called upon to pay in the event of the company being wound up, and which will remain the same whatever his pecuniary interest in the company may be. Associations of this kind are called "Companies Limited by Guarantee"; but the remarks respecting these are deferred to a later chapter (see Chapter VI., page 73, *infra*).

The following are the words of the Act (Section 123) defining the extent to which members and directors of limited companies are liable in the event of liquidation:—

123.* (1) In the event of a company being wound up, every present and past member shall, subject to the provisions of this section, be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities and the costs, charges, and expenses of the winding up, and for the adjustment of the rights of the contributories among themselves, with the qualifications following (that is, to say).—

- (i.) A past member shall not be liable¹ to contribute if he has ceased to be a member for one year or upwards before the commencement of the winding up²:
- (ii.) A past member shall not be liable¹ to contribute in respect of any debt or liability of the company contracted after he ceased to be a member:
- (iii.) A past member shall not be liable¹ to contribute unless it appears to the court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act:

¹ Sub-sections (i), (ii), (iii) apply to companies limited by guarantee as well as to those limited by shares (Premier Underwriting Association No. 1, [1913] 2 Ch. 29).

² That is as a "contributory." He can be sued for unpaid calls which became due before he ceased to be a member, for these had become a debt to the company while he was a member (*Ladies' Dress Association v. Pulbrook*, [1900] 2 Q. B. 376).

- (iv.) In the case of a company limited by shares no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member¹:
 - (v.) In the case of a company limited by guarantee no contribution shall be required from any member exceeding the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up:
 - (vi.) Nothing in this Act shall invalidate any provision contained in any policy of insurance or other contract whereby the liability of individual members on the policy or contract is restricted, or whereby the funds of the company are alone made liable in respect of the policy or contract:
 - (vii.) A sum due to any member of a company, in his character of a member, by way of dividends, profits, or otherwise, shall not be deemed to be a debt of the company, payable to that member in a case of competition between himself and any other creditor not a member of the company; but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributories among themselves.
- (2) In the winding up of a limited company, any director or manager, whether past or present, whose liability is, in pursuance of this Act, unlimited, shall, in addition to his liability (if any) to contribute as an ordinary member, be liable to make a further contribution as if he were at the commencement of the winding up a member of an unlimited company: Provided that—
- (i.) A past director or manager shall not be liable to make such further contribution if he has ceased to hold office for a year or upwards before the commencement of the winding up.
 - (ii.) A past director or manager shall not be liable to make such further contribution in respect of any debt or liability of the company contracted after he ceased to hold office:
 - (iii.) Subject to the articles of the company, a director or manager shall not be liable to make such further contribution unless the court deems it necessary to require that contribution in order to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of the winding up.
- (3) In the winding up of a company limited by guarantee which has a share capital, every member of the company shall be liable, in addition to the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up, to contribute to the extent of any sums unpaid on any shares held by him

In the event of a company going into liquidation existing members are placed upon the "A List" of Contributories. Past members who remain liable are placed on a separate list, commonly referred to as the "B List."

¹ Thus where shares have been forfeited and re-sold payment by the original owner after forfeiture relieves the purchaser from liability (*Randt Gold Mining Co.*, [1804] 2 Ch. 468).

The limitation of liability protects members from actions brought in England by foreigners in respect of business done in countries where limited liability is not recognised.¹

5. THE NOMINAL CAPITAL.

In Companies Limited by Shares the capital must be divided into shares of a certain fixed amount, and a statement to that effect included in the Memorandum: *e.g.* "The Share Capital of the Company is Ten Thousand Pounds, divided into Ten Thousand Shares of One Pound each."

In Companies Limited by Guarantee or Unlimited there is not necessarily any capital. But if there is such a capital, it is, in the case of a Company Limited by Guarantee and registered before the 1st January, 1901, or in the case of an Unlimited Company, stated in the Articles of Association only (Section 10). In the case of a Company Limited by Guarantee registered since the 31st December, 1900, the capital (if any) must be stated both in the Memorandum and Articles of Association (Sections 4 and 10). Any provision dividing the undertaking of the company into shares or interests amounts to a provision for a capital divided into shares, and accordingly brings into operation the requirement that the amount of the capital and number of the shares are to be stated in the Memorandum of Association (Section 21).

If it is intended that part of the shares in the original capital should have certain privileges or conditions attached to them, the particulars may either be given in the clause of the Memorandum specifying the amount of the capital, or the Articles of Association may define the rights of the various classes of shareholders.

It is convenient to take powers in the Memorandum to issue shares with preferred or deferred rights. It was formerly held that unless such powers were taken at the inception of the company they could not be subsequently acquired. It has, however, been decided in the Court of Appeal that a company can at any time take these powers² unless the Memorandum of Association expressly stipulates otherwise³; but it is as well to show on the face of the Memorandum that it is intended that the powers may be exercised.

If the Memorandum defines the respective rights, they cannot subsequently be varied⁴ without the sanction of the Court, in a proceeding under Section 45 or Section 120, unless the Memorandum also confers powers to alter such rights¹; and if it refers to contemporaneous Articles as declaring the rights, it seems that this

¹ *Risdon Iron and Locomotive Works v. Furness*, [1906] 1 K. B. 49.

² *Andrews v. Gas Meter Co.*, [1897] 1 Ch. 301.

³ *Ashbury v. Watson*, [1885] 30 Ch. D. 376; but see *infra* as to the effect of Section 120.

⁴ *Underwood v. London Music Halls*, [1901] 2 Ch. 309; *Welsbach Incandescent Gas Co.*, [1904] 1 Ch. 87.

makes the Articles for the purpose part of the Memorandum and therefore unalterable, but not if it refers to such rights as the Articles of Association may from time to time confer.¹ As companies often desire to vary the respective rights given to different classes of shareholders, it is wise only to take power in the Memorandum to issue preferred, ordinary, and deferred shares, and to leave the declaration of the rights to be attached to such shares to the Articles or subsequent special resolutions.

Power is often taken in the Memorandum Articles to modify the rights of the respective classes of shareholders with the sanction of an extraordinary resolution of the holders of shares of the class affected, and this power has frequently been acted upon. But a power to "modify" rights cannot be used to extinguish rights without giving anything in place of them.² Where the rights are conferred by the Articles only or the proposed alteration does not affect the provisions of the Memorandum, it is not necessary to have recourse to the procedure required by Section 45 in cases where preferential rights conferred by the Memorandum are to be varied.³

Since the Act of 1907 it has become possible to vary the rights of different classes of shareholders, even when powers for this purpose have not been taken in the Memorandum and Articles, and this will be so even if the rights are stated in the Memorandum⁴; but such a variation will require the sanction of the Court, which may refuse its approval if the arrangement is not in all respects fair and desirable. The method of effecting the variation will be by proceeding under Section 120, which adopts and extends the provisions of The Joint Stock Companies Arrangement Act, 1870, making them applicable when the company is not in liquidation. The method of procedure will be found set out in the chapter on RECONSTRUCTION (page 620, *infra*). Except in the very limited cases referred to in Section 45 (see *infra*), all that is necessary is a three-quarters majority of the holders of the classes of shares affected present or represented⁵ at separate meetings called by Order of the Court, and the sanction of the Court. A view which at one time prevailed that in all cases affecting the rights of Preference Shareholders the requirements of Section 45 must be observed is not correct.⁶

There seems no reason why a fair arrangement altering the respective rights of preference, ordinary, and deferred shareholders

¹ *Collins v. Birmingham Breweries*, [1899] 15 Times L. R. 180.

² *Gill v. Arizona Copper Co.*, [1901] Court of Sess., 2 F. 813.

³ *Australian Estates Co.*, [1910] 1 Ch. 414; *Palace Hotel Co.*, [1912] 2 Ch. 438.

⁴ *Re J. A. Nordberg, Limited*, [1915] 2 Ch. 430.

⁵ *Schweppes, Limited*, [1914] 1 Ch. 322.

which has obtained the support of majorities of each class should not be sanctioned by the Court and made binding on all parties concerned under this section. It has been held in the Court of Appeal that any scheme which is an "arrangement" may be sanctioned under this section, and it is not necessary that there should be something analogous to a "compromise."¹

There are further provisions contained in Section 45 that a Company Limited by Shares may by special resolution, confirmed by an Order of the Court, modify the conditions contained in its Memorandum of Association so as to reorganise its capital, whether by the consolidation of shares of different classes or by the division of its shares into shares of different classes, provided that no preference or special privilege attached to or belonging to any class shall be interfered with except by a resolution passed by a majority in number of shareholders holding three fourths of the capital (*i.e.* the issued capital) of that class, and confirmed at a meeting of shareholders of that class in the same manner as a special resolution is required to be confirmed (*i.e.* by a bare majority of those present or represented at a properly convened meeting); and it is declared that every resolution so passed shall bind all shareholders of such class.

The provisions of Section 45 for binding preference shareholders require a bare majority in number of the shareholders, but the majority must represent three fourths of the total capital of the class, not three fourths of those present or represented at the meeting as in the case of a special resolution.² This provision does not apply to cases where the preferential rights are conferred by the Articles and not by the Memorandum,³ and where an alteration gave preference shareholders a right to participate in surplus profits rateably with the ordinary shareholders it was held unnecessary to hold a separate meeting of the ordinary shareholders.⁴ An alteration such as is referred to in Section 45 cannot be carried out under Section 120 alone—*i.e.* without regard to the special provisions of Section 45.⁵ But if no consolidation of shares or division of shares into different classes is involved Section 45 has no application,⁶ and a mere increase of the number of shares of any class does not alter the rights of the class within the meaning of either Section 45 or 120.⁶

¹ *Re Guardian Assurance Co.*, [1917] 1 Ch. 431.

² *Foucar & Co.*, [1913] W. N. 83, which also shows that the resolution must be at a meeting and that proxies may be used.

³ *Australian Estates Co.*, [1910] 1 Ch. 414.

⁴ *Stewart Precision Carbuettor Co.*, [1912] 56 S. J. 413, 23 T. L. R. 335.

⁵ *Doehum Gloves, Limited*, [1913] 1 Ch. 226.

⁶ *Schweppes, Limited*, [1914] 1 Ch. 322.

Section 45 presents some difficulties. The earlier part is confined to "the consolidation of shares of different classes" or "the division of shares into shares of different classes," the former of which is hard to understand, but the latter is a comparatively simple matter. To consolidate 50,000 preference and 50,000 ordinary shares into 100,000 ordinary shares would simply be to deprive the preference shares of their priority. Possibly this is intended, the safeguards being considerable, for on the occasion of a reduction of capital it has been not uncommon, after reducing the amount of the ordinary shares from, say, £10 to £3, to make them rank equally with the preference shares (or, as it is called, to "unify" the stock), acting under powers to modify contained in the Articles. It may be that the intention of the Act is to make such a proceeding possible in all cases where the specified majority approves and the Court sanctions the arrangement.

When any such consolidation or division is sanctioned by order of the Court an office copy of the Order must be filed with the Registrar within seven days after the making of the Order, and the resolution will not take effect until the copy is filed (Section 45, Sub-section 2).

If the Memorandum or Articles allow, a company may at any time increase its capital to any extent, as explained in Book II., Chapter VI. (see page 420, *infra*). The increased capital may be divided into shares of a greater or less value than those with which the company was originally registered.

The earlier Companies Acts treated the capital of a company as a single item, and took no account of various classes of capital, although in practice it has always been very common for companies to have two or more varieties, such as Ordinary, Preference, Deferred, and Founders' Shares; while railway and some other companies have also Guaranteed Shares or Stock,¹ and sometimes divide Preference into First, Second, and Third Preference. All these differences are matters of arrangement, and a company can attach whatever rights and privileges it pleases to one class of shares, and postpone another class. In the absence, however, of express provisions to the contrary, the law treats all shares as conferring equal rights.

The Court will, in a properly constituted proceeding, declare what are the respective rights of classes of shareholders, but sometimes requires that a meeting of the class affected shall be held to appoint a member to represent it.²

¹ A company cannot, without statutory authority, guarantee that dividends shall be paid where there are no profits.

² *Morgan's Brewery Co. v. Crosskill*, [1902] 1 Ch. 898.

Money raised upon debentures is not part of the "capital" of the company, but is a debt due from the company, and the amount should not be set out in the Memorandum as part of the capital. Such money is often called "loan capital," and payments made out of moneys raised on debentures must be treated as paid on capital account.

The capital of the company can be increased by the company itself; but in the case of Companies Limited by Shares, and also in that of Companies Limited by Guarantee registered since the 31st December, 1900, it can only be reduced by an Order of the High Court of Justice confirming a special resolution of the company—a matter involving considerable delay and some trouble and expense.

The shares of a company formed under the Companies Acts cannot be issued at a discount (therein differing from companies formed subject to The Companies Clauses Act, 1845¹); nor may they be issued by way of a bonus or gift; but they may be issued at a premium. A commission may, however, be paid on the issue of shares in the cases governed by Section 89 (see page 158, *infra*).

The manner of the issue of shares will be dealt with in Chapter IX. of this Book I. (page 171, *infra*), and alterations of capital by increase or reduction in Chapter VI. of Book II. (page 420, *infra*).

Preference Shares.

Preference shares may either (A) give a preferential right only as to dividend, or (B) give a preferential right both as to dividend and to the return of capital. In either case the preferential dividend may be cumulative, or it may be payable only out of the profits of each year.

It will be obvious that preference shares bear the same relation to ordinary that ordinary shares do to deferred, and that an identically similar arrangement may be expressed by saying either that one set of shares receives a dividend in preference to the others, or that the latter shares have their dividend deferred to that of the first named.

Whatever preferences or postponements are intended to be created should be clearly expressed in the Memorandum or Articles (if the original capital is divided into different classes), or in the special resolution authorising the issue of preferred or deferred shares, and also in the prospectus inviting subscriptions for the shares. It is also important to express clearly what are the rights of the various holders in case of a winding up. If the ordinary

¹ *Statham v. Brighton Marine Palace and Pier Co.*, [1899] 1 Ch. 199.

or deferred shares are not to receive the whole profits after the preferred shares have received their dividend, it is necessary to specify how the reserve fund, which is an accumulation of undivided profits, is to be dealt with. It is also desirable to deal expressly with the premiums receivable upon shares issued above par.¹

As stated on pages 23 and 24, *supra*, Sections 45 and 120 enable companies to effect arrangements varying the rights of classes of shareholders.² Apart from these powers, if the rights of preference shareholders are determined by the Memorandum they cannot subsequently be varied,³ except where such variation is contemplated by the Memorandum itself⁴; but if only stated in the Articles, and a power is given to a majority of the class to enforce a variation, the minority will be compelled to submit, as, for instance, where preference shareholders under such a power surrender their right to arrears of dividend.⁵ A clear case must, however, be made out by those seeking to enforce the alteration on their fellow-members,⁶ and a power to modify rights does not entitle a majority to extinguish such rights.⁷ How far they may be varied under the statutory power to alter the Articles will depend upon whether there is a *contract* that the holders shall have the actual rights conferred.⁸ If the matter depends on the Articles alone, the company may take power by special resolution to effect an alteration⁹ (see page 45, *infra*).

Provisions in the Memorandum and Articles or in the terms of issue of preference shares which give the holders a preference in regard to dividend do not give a preference in regard to the division of capital unless it is expressly mentioned.¹⁰ Persons subscribing for or purchasing preference shares should protect themselves by inquiring what their rights will be in the case of a winding up; otherwise, upon a reconstruction of the company, they may be reduced to the position of holders of ordinary shares.¹¹

If the Memorandum or Articles declare that the preference shares confer a preference in the winding up, or that the surplus

¹ This premium is, in some sense, profit which may be divided as dividend (*Honre & Co.*, [1904] 2 Ch. 208); but this course is undesirable.

² *Schwepkes, Limited*, [1911] 1 Ch. 322.

³ *Ashbury v. Watson*, [1885] 30 Ch. D. 376.

⁴ *Underwood v. London Music Halls*, [1901] 2 Ch. 309, *Welsbach Incandescent Gas Co.*, [1904] 1 Ch. 87.

⁵ *Oban and Aultmore Glenhyat Distilleries*, [1901] Court of Sess., 5 F. 1141.

⁶ *Simpson v. Palace Theatre*, [1893] 9 Times L. R. 470.

⁷ *Gill v. Arizona Copper Co.*, [1901] Court of Sess., 2 F. 843.

⁸ See *Bailey v. British Equitable Assurance Co.*, [1901] 1 Ch. 374. This case was reversed in the House of Lords, [1906] App. Ch. 35, but the proposition that "a company cannot by altering its Articles justify a breach of contract" is recognised.

⁹ *Allen v. Gold Reefs of West Africa*, [1900] 1 Ch. 656.

¹⁰ See *Driffeld Gas Light Co.*, [1898] 1 Ch. 451, and next note.

¹¹ *Griffiths v. Paget*, [1877] 6 Ch. D. 511; *Birch v. Cropper*, [1880] 11 App. Ch. 528.

assets shall be applied first in repaying the preference shares, but do not further deal with the capital, there is a difference of judicial authority as to whether the preference shareholders participate in any surplus after repayment of the ordinary capital, *Swinfen Eady, J., Astbury, J., and Eve, J.*, having held that they do,¹ and *Sargant, J.* (relying upon the case of *Will v. United Lankat Plantations*²) that they do not,³ *Eve, J.*, in the *Anglo-French Company's* case, saying, "Does the provision in the bargain providing for what is to happen in the event of the assets being insufficient to repay the capital operate to preclude the preference shareholders in the event of the assets being more than sufficient to repay the capital from participating in the excess? I see no reason why it should do." If the preference capital is repayable "with interest," this means with interest from the date of winding up, and any surplus from the sale of assets will be treated as capital.⁴

Where the Articles declare that the preference shareholders are to be paid, in a winding up "arrear of the preference dividend" there will be no such arrears if the preference dividend was payable out of the profits of each year, and there were no profits before the winding up,⁵ and *Swinfen Eady, J.*, held the same in the case of cumulative dividends⁶; but *Neville, J.*, in a case where the value of the assets rose after the liquidation, disputed this proposition, and held that in the case before him there were profits, and the preference shareholders were entitled to arrears as from the date of issue to the commencement of the winding up,⁶ and *P. O. Lawrence, J.*, held that although there were no profits, "arrear of dividend" meant the deficiency in the 'dividend of ten per cent. per annum which the preference shareholders would have been entitled to receive if there had been profits.⁷ The question must be considered doubtful until the Court of Appeal decides it. It has been held that profits earned after the winding up has commenced are divisible as capital.⁸

If shareholders are by the Articles entitled only to dividends when declared, a preference shareholder cannot after liquidation claim payment on the ground that a dividend might have been declared.⁹

¹ *Espuela Land and Cattle Co. No. 2*, [1900] 2 Ch. 187; *Fraser & Chalmers, Limited*, [1919] 2 Ch. 755; *Anglo-French Music Co.*, [1921] 1 Ch. 386.

² *Will v. United Lankat Plantations*, [1912] 2 Ch. 571, [1914] App. Ca. 11.

³ *Re National Telephone Co.*, [1914] 1 Ch. 755.

⁴ *Espuela Land and Cattle Co. No. 2*, [1900] 2 Ch. 187.

⁵ *W. J. Hall & Co.*, [1900] 1 Ch. 521.

⁶ *New Chinese Antimony Co.*, [1916] 2 Ch. 115.

⁷ *Springbok Agricultural Estates*, [1920] 1 Ch. 563.

⁸ *Bishop v. Smyrni and Cassaba Railway No. 2*, [1895] 2 Ch. 506. See also *re Armitage*, [1893] 3 Ch. 337, 346.

⁹ *Odessa Waterworks*, [1901] 2 Ch. 190 n.

A declaration that the profits are to be applied first in paying a dividend on the preference shares, and secondly on the ordinary shares, gives the preference shareholders a cumulative dividend,¹ unless there is some other Article which shows that the profits of each year are to be distributed among the preference and ordinary shareholders on the basis named²; a declaration that a preferential dividend is to be paid "out of the net profits of each year," and after such payment a dividend on the ordinary shares, does not give a cumulative dividend.³ The Articles will on this point, as on others, be construed as they stand, and the fact that the company is a reconstructed one and that the word "cumulative" found in the earlier Articles has been struck out will not affect the decision of the Court in a clear case.⁴

If the Articles simply declare that certain shares are to confer a right to a cumulative preferential dividend of ten per cent., this is all they will be entitled to receive; if it is intended they should have any further participation in profits their right must be expressly stated.⁵

A right to a dividend of a fixed amount, say ten per cent., is subject to deduction therefrom of the appropriate amount by the company of income tax.⁶ The company deducts this tax at the rate it has to pay, and the shareholder, if entitled to be assessed on a lower scale, must apply to the Commissioners of Inland Revenue for a return of the excess.

Prima facie such documents as debentures, policies, and, it is submitted, preference and other share certificates, express all the rights of the holders, and the prospectus cannot be looked at for the purpose of interpreting them.⁷ This rule as to interpretation does not, however, exclude proof that the prospectus did, in fact, contain part of the contract, or constituted a binding collateral contract.⁸

Sometimes, by the provisions of the Articles, the holders of preference shares are precluded from voting in respect of such shares,⁹ but it is desirable that they should have the right to vote on

¹ *Webb v. Earle*, [1875] 20 Eq. 556; *Foster v. Coles and M. B. Foster & Sons*, [1906] W. N. 107; *Henry v. Great Northern Railway*, [1877] 1 De G. & J. 606.

² *Adam v. Old Bushmills Distillery*, [1908] W. N. 24.

³ *Staples v. Eastman Co.*, [1896] 2 Ch. 393; *Adam v. Old Bushmills Distillery*, [1908] W. N. 24.

⁴ *Foster v. Coles and M. B. Foster & Sons*, [1906] W. N. 107.

⁵ *Will v. United Latukut Plantations Co.*, [1912] 2 Ch. 571, [1914] App. Ch. 11.

⁶ *Attorney-General v. Ashton Gas Co.*, [1906] App. Ch. 10.

⁷ *Chicago North West Gramines Co.*, [1898] 1 Ch. 263 (which related to an issue of debentures); *Tewkesbury Gas Co.*, [1912] 1 Ch. 1; *British Equitable Assurance Co. v. Baily*, [1908] App. Ch. at pages 38 to 41 (which related to an insurance prospectus).

⁸ *Jacobs v. Batavia &c. Trust*, [1921] 1 Ch. 287; [1921] 2 Ch. 320 (which related to an issue of short term notes).

⁹ Such a provision seems to be valid and a resolution for reduction of capital can be passed in their absence (*Re Mackenzie & Co.*, [1916] 2 Ch. 450).

any question directly affecting their rights or interests. Occasionally the Articles contain a further provision that preference shareholders shall not be entitled to be present at general meetings in respect of their preference shares. Such a provision appears to be lawful where the preference shareholders have no right of voting. It is to be observed that Section 114 confers on the holders of preference shares (and debentures) of public companies registered after the 30th June, 1908, the same right to receive and inspect balance sheets and the reports of the auditors and other reports as is possessed by the holders of ordinary shares.

Sometimes it is desired to issue new shares taking priority over preference shares which have already been issued. Whether this can be done against the wishes of the holders of the original preference shares will depend upon the bargain that was made with them at the time their shares were issued, and to determine the question careful attention must be paid to the provisions of the Memorandum and Articles of Association and to the form of the share certificate. If it appear that a promise was made to the holders of preference shares that their rights should in all circumstances come first, they cannot be postponed¹; but if the preference shares were issued subject to the right of the company to issue fresh capital having "such preferences and priorities as shall be agreed upon" or "on such terms as the company may determine," then the original preference shares may be postponed.²

If shares are issued as preference shares when there is no power to do so, or in an irregular manner, the subscribers are entitled to have the money they have paid for the shares returned and are creditors of the company.³

Profits may be applied, after the sanction of the Court has been obtained (this being a reduction of capital), in paying off preference shares.⁴ It was held by the Court of Appeal in 1873 that holders of existing shares might surrender them and receive in exchange new shares to an equal amount.⁵ This was disapproved by the Court of Appeal in 1902 in a case

¹ *James v. Buena Ventura Syndicate*, [1896] 1 Ch. at page 466, *Welton v. Saffery*, [1897] App. Ca. at page 309.

² *Pullbrook v. New Civil Service Co-operation*, [1878] 20 W. R. 11; *Underwood v. London Music Halls*, [1901] 2 Ch. 309, compare *Allen v. Gold Reefs of West Africa*, [1900] 1 Ch. 656.

³ *London and New York Investment Corporation*, [1895] 2 Ch. 860; *Waverley Co. v. Baumerman*, 23 Court Sess. Ca., 4th Series, 136. Comp. Home and Foreign Investment Corporation, [1912] 1 Ch. 72.

⁴ *Deirdo Pier Co.'s Case*, [1891] 2 Ch. 354.

⁵ *Tensdale's Case*, [1873] 9 Ch. 54, followed by *Stirling, J.*, in *Eichbaum v. City of Chicago Grain Elevators*, [1891] 3 Ch. 459.

where the surrender involved a reduction of liability,¹ but Warrington, J., followed the earlier authority in a case where no reduction of liability arose.²

Founders', Management, and Deferred Shares.

Founders' or management shares a considerable time ago came a good deal into fashion. They are not, however, now held in much favour except among companies of a speculative character, such as mining and development companies. They are, in fact, only deferred shares, receiving no dividend until the preference and ordinary shares have been paid a dividend at a specified rate, the amount varying according to agreement. The founders', management, or deferred shares are usually few in number, and when the surplus profits are large they become very valuable.

The practice is to use such shares to remunerate the promoters or founders of the company, or the underwriters of the share capital, who are allotted founders' or deferred shares of a small nominal amount, but entitled to take (say) half the net profits after a specified dividend has been paid on the ordinary shares. If, e.g., there are only 500 founders' or deferred shares of £1 each, and there are several thousand pounds surplus profits, to half of which the founders are entitled, it will be seen that for each pound subscribed the founders receive some hundreds per cent., and to this they look as part of their compensation for founding and floating the company. Sometimes, as an inducement to the public to subscribe, one founders' or deferred share is offered for every hundred ordinary shares taken, the larger shareholders thus getting a second and contingent interest in the profits of the company.

Sometimes it is attempted to exchange founders' or deferred shares for a larger nominal amount of ordinary shares, but this is in the nature of issuing the ordinary shares at a discount, and is not lawful.³

The existence of founders' or deferred shares of course diminishes the value of the ordinary shares, as in the case of large profits a considerable proportion is taken by the holders of founders' or deferred shares. It is also an objection that they often create difficulties in the case of a reconstruction of the company. Another objection to such shares is that in years of great prosperity they

¹ Bellerby v. Rowland and Marwood's Steamship Co., [1902] 2 Ch. 14.

² Rowell v. John Rowell & Sons, [1912] 2 Ch. 609.

³ Development Co. of Central and West Africa, [1902] 1 Ch. 517. See also Anglo-French Exploration Co., [1902] 2 Ch. 845.

absorb all the surplus profit which prudent traders would carry to reserve, so that in bad years the company has no accumulation of profit to fall back upon.

Where additional shares are issued at a premium, the founders often claim this premium to be profit, and demand their proportionate share¹; but this is undesirable, and the Articles should provide that in such a case the premium shall be carried to a reserve fund and not be distributable as dividend.

In the Stock Exchange official Daily List the companies which have issued founders' or deferred shares are indicated by an asterisk.

Under Section 81 every prospectus must state the number of founders', management, or deferred shares (if any) and the nature and extent of the interest of the holders in the property and profits of the company, and also the voting rights of each class.

THE DECLARATION OF ASSOCIATION.

The Memorandum must end with the Declaration of Association, which in the case of a Company having a Share Capital is in the following form² :—

We the several persons whose names, addresses, and descriptions are subscribed are desirous of being formed into a Company in pursuance of this Memorandum of Association, and we respectively agree to take the number of Shares in the Capital of the Company set opposite our respective names.

NAMES, ADDRESSES, AND DESCRIPTIONS OF SUBSCRIBERS.	NUMBER OF SHARES TAKEN BY EACH SUBSCRIBER.
[Here follow the names, addresses, and descriptions of not less than seven persons in the case of a Public Company, or two in the case of a Private Company, each of whom must subscribe for one share at least. Each subscriber <i>must write with his own hand</i> his name and the number of shares he agrees to take. His address and occupation may be written by any other person.]	

In the case of a Company Limited by Guarantee or an Unlimited Company not having a Share Capital the Declaration of Association³ is—"We the several persons whose names and,

¹ That such a premium may be applied in paying dividends appears from *re Hoare & Co.*, [1904] 2 Ch. 208.

² See Schedule III., Forms A, C, and D, in the Consolidation Act of 1908. (The words "and descriptions" in the first line of the Declaration do not appear in Schedule III., but they are required by the Registrar of Companies.)

³ See Act of 1908, Schedule III., Form B. In the case of Unlimited Companies the words "and addresses" are omitted, but this is a slip, for the table below contains a form showing the addresses.

addresses are subscribed are desirous of being formed into a Company in pursuance of this Memorandum of Association," and the table below contains no column for the number of shares taken.

When a vendor signs the Memorandum and Articles of Association it is advisable for him to subscribe for one share only, and to pay for that share in cash, in the same manner as the other subscribers. He should not sign for the shares he is to receive as consideration for the sale of his property to the company. This is not so material since the repeal of Section 25 of the Act of 1867, for the company can now, by a contract made with the vendor after the issue of the shares, agree to accept payment otherwise than in cash. Prior to that repeal the subscriber to the Memorandum could not escape liability to pay for his shares in cash,¹ except under very special circumstances.²

Subscribers usually sign for only one share each; but there is no reason why they should not sign for as many shares as they intend to take up and pay for. The fact that they have subscribed makes them members of the company from the date of registration (page 84, *infra*). Directors named in Articles filed contemporaneously with the Memorandum are required by Section 72, in the case of all companies not being private companies, to subscribe the Memorandum for their qualification shares (if any), or sign and file with the Registrar a Contract to take them from the company and pay for them.³

A subscriber to the Memorandum cannot obtain rescission of his agreement to take shares on the ground that he was induced to take the shares by fraud, for at the time of his subscription the company had no existence and could not be a party to the fraud.⁴

The name, address, and occupation of each subscriber should be stated fully, giving the number, street, town or post-town, and county. The trade or profession (if any) of each subscriber must also be stated, and it is best to avoid indefinite descriptions, such as "Gentleman" and "Esquire," when possible. Persons who have retired may describe themselves as "Retired Merchant," or "late Captain R.N.," &c. A clerk should state the nature of his

¹ See, for example, *Fothergill's Case*, [1873] 8 Ch. 270, *Dalton Time Lock Co. v. Dalton*, [1892] 66 L. T. 707, *Smith v. Brown*, [1896] App. Ca. 614, *Jarvis & Co.*, [1899] 1 Ch. 193, and *Archibald Dawney*, [1900] W. N. 152.

² *Whitehead Brothers*, [1900] 1 Ch. 804.

³ The Registrar accepts as a compliance with this requirement a document containing the words "We the undersigned, having consented to act as Directors of the A Company, Limited, do hereby severally agree to take from the said company and to pay for shares of each, being the prescribed number of qualification shares for the office of director of the company." This document has to be impressed with a five-shilling registration fee stamp and with a sixpenny agreement stamp in respect of each signature.

⁴ *Lord Lurgan's Case*, [1902] 1 Ch. 707.

clerkship, whether "Solicitor's Clerk," "Merchant's Clerk," or otherwise. So an agent should state whether he is a "Financial Agent," "Patent Agent," "Commission Agent," or otherwise.

Females may subscribe as well as males. An unmarried woman should describe herself as "Spinster" or by her occupation if she has one, such as "Milliner" or "Cashier"; a married woman as "Married Woman" or "Wife of So-and-So," preferably the latter. All or any of the signatories may be foreigners.¹ The Memorandum may be signed by, or on behalf of, corporations and firms, but the Registrar requires that it must also bear the signatures of the prescribed number of individuals, and any signature for a firm should state the names of all the partners (see page 85, *infra*).

Minors (*i.e.* persons under age) should not subscribe; for, although the Registrar's certificate is conclusive evidence that the company is duly registered,² the Registrar would refuse to accept the Memorandum or grant the Certificate of Incorporation if he had reason to believe the Memorandum was not signed by adults.

An agent may sign the Memorandum on behalf of his principal, and the authority to sign may be given orally. The execution will be good, whether the agent simply writes his principal's name or adds words showing that it is signed by an attorney.³ In the latter case the Registrar will require production of a written authority, stamped with ten shillings as a power of attorney.

The signatures must be attested by one or more witnesses. A witness should be a disinterested person, and not a subscriber. He should give his address and occupation in the same manner as the subscribers. The document may be signed at different times and different places, and be witnessed by different persons.

All the above directions with respect to the signatures &c. apply to the Articles (if any), with the exception that the number of shares taken need not be stated.

The Memorandum should be in correct form when presented for registration, and any alterations and interlineations in it should be initialled by each subscriber, or the witness should certify that the alterations were made before the document was executed.

For the purpose of registration, the Memorandum may be either entirely written upon a sheet or sheets of foolscap; or it may be written upon the forms provided for that purpose, in which case it will be partly written and partly printed; or it may be entirely printed. As, however, every member is entitled to be supplied with a copy on payment of one shilling, printing is almost

¹ General Company for Promotion of Land Credit, [1870] 5 Ch. 363.

² Companies Act, 1900, Section 1; Consolidation Act, 1908, Section 17.

³ Whitley Partners, Limited, [1886] 32 Ch. D. 337.

indispensable. Printing the document has the further advantage that every copy is an exact reproduction of the registered original.

If the company is to be registered without Articles, the fact must be stated on the back of the Memorandum. In that case the regulations contained in Table A in the First Schedule to the Act of 1908 will govern the company (Section 11). In the case of companies registered before the 1st October, 1906, the original Table A in the Schedule to the Act of 1862 applies; in that of companies registered between that date and the 31st March, 1909, the Revised Table A of 1906 applies.

Before it can be registered the Memorandum of Association must be properly stamped and be accompanied by a Statement of the Nominal Capital, on which capital duty is payable at the rate of one pound per cent.¹

Under Section 72 the applicant must, in the case of companies not being private companies, at the time of the application for registration of the Memorandum and Articles, deliver to the Registrar a list of the persons who have consented to be directors, and if any person's name is wrongly included the applicant is liable to a penalty of fifty pounds. If the directors are appointed by the Articles they must either sign the Memorandum for their qualification shares or sign a Contract to take from the company and pay for such shares,² which Contract, together with a Consent to Act, signed by each director, must be filed with the Registrar. If the Contract is to take shares to the value of five pounds or over, it must bear a sixpenny agreement stamp in respect of each signature; if for shares to a less value than five pounds, the Contract is exempt from duty (Stamp Act, 1891, Section 22 and Schedule).

There must also be a Statutory Declaration by a solicitor engaged in the formation of the company, or by a person named in the Articles as director or secretary,³ that all the requirements of the Act have been complied with (Section 17, Sub-section 2). This form has to be impressed with a five-shilling registration fee stamp. The Registrar accepts a Declaration by either of those persons as sufficient evidence, and, if the other documents are in order, registers the company and issues his Certificate of Incorporation.

Assurance companies dealing with Life Assurance, the granting of Annuities, Fire Insurance, Employers' Liability Assurance, Accident Assurance, and Bond Investment are dealt with in Chapter IV., page 54 *et seq., infra*; Banking Companies in Chapter V., page 70, *infra*.

¹ See the Table of Stamp Duties and Fees in Appendix B.

² See note⁴ on page 34, *supra*.

³ As to cases where there are no Articles see note¹ on page 8, *supra*.

ALTERATION OF THE MEMORANDUM OF ASSOCIATION.

The Memorandum of Association can be altered in the following respects :—

1. By changing the name of the company (Section 8).
2. By varying the amount of its capital (Sections 41 and 46).
3. By altering the division of its capital, consolidating or subdividing the existing shares, converting paid-up shares into stock, or reconverting stock into paid-up shares (Section 41).
4. By creating reserve liability (Sections 58 and 59).
5. By making the liability of the directors, or managers, or of any managing director, unlimited (Section 61).
6. By altering to a limited extent the objects for which the company was formed (Section 9).

With regard to these, Nos. 2, 3, and 4 will be dealt with in Book II., Chapter VI., page 420 *et seq., infra*, and No. 5 in Book II., Chapter I, page 323, *infra*. It only remains to deal here with the Change of Name and Alteration of the Objects of a Company.

Change of Name of Company.

To change its name a company must (Section 8)—

1. Pass, confirm, and register a special resolution ;
2. Obtain the consent of the Board of Trade¹ to the proposed change, and file the same with the Registrar; and
3. Obtain from the Registrar a certificate of registration of the new name as authorised by the Board.

Before the sanction of the Board of Trade to a change of the name of a company can be obtained, evidence must be afforded, if required, that no alteration of the business for which the company was incorporated is intended. The Board may also require to be informed the reason for the proposed change. Care should be taken that the proposed name does not resemble that of any existing company, and inquiry should be made whether there is any company already in existence with a name similar to that proposed to be taken.

No alteration of name will affect a company in any of its rights or obligations, or render defective any legal proceedings by or against the company, and any legal proceedings that might

¹ A change may be made with the sanction of the Registrar only in the circumstances referred to on page 11, *supra*.

- have been continued or commenced against it by its former name may be continued or commenced against it by its new name (Section 8, Sub-section 5).

When a company obtains power to extend its objects, it is often required by the Court to make a corresponding alteration in its name.¹ On the other hand, the Board of Trade will not sanction a change of name to one which would appear to indicate a change in the main object of the company, or which seems inconsistent with the main object. A money-lending company will be precluded by The Moneylenders Act, 1911, from adopting the word "Bank" in its name, and any words which are objectionable in the original name will be open to the same objection on a change of name.

Alteration of Objects Clauses.

A company registered under the Companies Acts² may, under Section 9, alter the provisions of its Memorandum of Association or Deed of Settlement with respect to the objects of the company, or substitute a Memorandum for a Deed of Settlement, by special resolution, for any of the following purposes:—(A) To enable it to carry on its business more economically or more effectually; (B) To attain its main purpose by new or improved means; (C) To enlarge or change the local area of its operations; (D) To carry on some business or businesses which under existing circumstances may conveniently or advantageously be combined with the business of the company; (E) To restrict or abandon any of the objects specified in its Memorandum or Deed of Settlement.

It will be observed that a company has unrestricted power of limiting or narrowing the scope of its objects, but restricted powers of increasing them.

No alteration of the Memorandum or Deed of Settlement will take effect until and except in so far as it is confirmed by the Court which would have jurisdiction to wind up the company.³ The

¹ See page 40, *infra*.

² *Romer, J.*, held that a company registered only under The Joint Stock Companies Act, 1856, must re-register under the then existing Companies Acts before taking advantage of the Memorandum of Association Act (General Credit Co., [1891] W. N. 143); but *Kekewich, J.*, *Wright, J.*, and *Swinfen Eady, J.*, have held the contrary (*re Nitro Phosphate Co.*, [1893] W. N. 141; *re Hong Kong Gas Co.*, [1898] W. N. 158; *Copapo Mining Co.*, [1899] W. N. 25, 6 Mans. 320; *Euphrates and Tigris Steam Navigation Co.*, [1901] 1 Ch. 390); and other Judges (*e.g.* *Stirling, J.*, and *Byrne, J.*) have followed this latter holding. It may therefore be taken to be the law. The power also applies to an Unlimited Company without capital (*North of England Iron Steamship Insurance Association*, [1900] 1 Ch. 481).

³ Where a company originally formed under a Deed of Settlement and subsequently registered under the Companies Act proposed to adopt a Memorandum in place of the Deed of Settlement it was held that the sanction of the Court was necessary, although the alteration was one of form only and did not affect the objects of the company (*Brantree & Bocking Gas Co.*, [1920] 2 Ch. 12.)

confirmation must be sought by petition,¹ and the Court is bound by the following rules:—(1) It must be satisfied that the holders* of debentures and any persons whose interests are affected have had sufficient notice, and that all creditors who in the Court's opinion have any right to object, or have objected, have consented, or have had their debts provided for either by payment or security. (2) The Court may attach terms and conditions to the Order confirming the alteration, and has the costs in its discretion. (3) The Court must have regard to the rights of members or classes of members as well as to the rights and interests of creditors, or, in other words, must protect a dissentient minority of shareholders, and may adjourn the proceedings to allow of arrangements being made with them for the purchase of their interests. But no part of the capital may be spent in buying them out: *i.e.* if their interests are to be purchased, it must be with money provided either by shareholders or strangers, and not out of the capital of the company. (4) The Court may confirm the alteration either wholly or in part, or may add words limiting the generality of the proposed alteration,² or strike out part of the additions³

All the Court has to do is to decide whether the alteration is fair and equitable as between the members of the company. It is not concerned with the wisdom or desirability of the proposed alteration, which is a question for the members, but will refuse its sanction if the wishes of the majority cannot be fairly ascertained.⁴

No person who is neither a member nor a creditor has any right to be heard on the petition, and the Court will not entertain an objection of a competitor in business on a suggestion that the new powers may be so used as to infringe the rights of the competitor.⁵

The section does not empower the Court to sanction mere changes of wording or the adoption of modern forms for greater convenience; the alterations must fall within one or more of the specified heads,⁶ and as a matter of practice the Court will not, as a rule, allow large general additional powers to be taken, but will require evidence that the specific objects mentioned are required for some of the purposes stated above.⁷

¹ The petition must be advertised, but the Court does not require the whole resolution to be set out if the effect is sufficiently stated (*Atlantic Patent Fuel Co.*, [1917] W. N. 214 and 253). At the hearing of the petition the original Memorandum and Articles of Association and the Minute Book containing the special resolutions for the alteration must be made exhibits to the affidavits used (*Omnum Investment Co.*, [1895] 2 Ch. 127).

² *Re Spiers & Pond*, [1895] W. N. 135 (2); *re Fleetwood Estate Co.*, [1897] W. N. 20.

³ *Ulster Marine Co.*, [1891] 27 L. R. Ir. 487.

⁴ *Jewish Colonial Trust*, [1908] 2 Ch. 287.

⁵ *Hearts of Oak Life Assurance Co.*, [1920] 1 Ch. 544.

⁶ *Consett Iron Co.*, [1901] 1 Ch. 230.

⁷ *D. & D. H. Fraser*, [1903] W. N. 73, where in very special circumstances wide powers were allowed to be taken; *re John Brown, Limited*, and *re Tredegar Iron Co., Limited*, [1914] W. N. 431, 59 S. J. 140, where Nevillo, J., laid down the rule, but ultimately allowed numerous alterations with an addition of a clause requiring a special resolution before their exercise, except so far as they were to be used for subsidiary causes only.

The following cases have come before the Courts:—

An alteration giving a company, formed to invest in Government Securities only, power to invest generally, was refused on the opposition of some debenture holders,¹ but was granted later on, when the consent of a greater number of debenture holders had been obtained and additional security had been given them.² Another Investment Company was allowed to extend the range of its investments on the condition that its name was changed so that creditors should not be misled.³ Similarly, the Indian Mechanical Gold Company was allowed to extend its Memorandum so as to include places outside India, on altering its name by adding the words “and General,”⁴ and a Land and Investment Company was permitted to extend the area of its operations on making a corresponding alteration of name⁵; a Telephone Company was authorised to supply electricity for other purposes,⁶ and a Marine Insurance Company was allowed to extend its business to insurance against risks of carriage by land and to life, fire, and accident insurance connected with transit by sea or land, in each case on making a change of name.⁷ In the case of a Boiler Insurance Company, besides the change of name, the consent of existing policyholders was required to clauses authorising an extension of business.⁸

The requirement as to making a change in name is not however at the present time so rigidly enforced.

A company lending money on real estate was allowed to extend its operations from Australia to Argentina without a change of name.⁹

A new power to issue debentures has been authorised.¹⁰

A Single Steamship Company has been allowed to take powers to acquire and own other ships, no shareholder objecting,¹¹ and a Manufacturing Company to invest moneys not immediately required in general securities.¹² In a Scotch case an extension of the area

¹ Government Stock Investment Co., [1891] 1 Ch. 649.

² Government Stock Investment Co. No. 2, [1892] 1 Ch. 597.

³ Foreign and Colonial Government Trust Co., [1891] 2 Ch. 395.

⁴ Indian Mechanical Gold Co., [1891] 3 Ch. 538.

⁵ Egyptian Delta Land Co., [1907] W. N. 16, adding the words “and Soudan” after “Delta.”

⁶ Oriental Telephone Co., [1891] W. N. 153.

⁷ Alliance Marine Insurance Co., [1892] 1 Ch. 300.

⁸ National Boiler Insurance Co., [1892] 1 Ch. 306.

⁹ Trust and Agency of Australasia, [1908] W. N. 229.

¹⁰ Reversionary Interest Society, [1892] 1 Ch. 615.

¹¹ Bernicia Steamship, [1900] W. N. 24, 60 L. J. Ch. 194, 81 L.T. 816.

¹² Conds' Petition, [1901] Court of Sess., 2 F. 829.

within which business was to be done was authorised without a change of name.¹ In Ireland a Bank has been allowed to take powers to act as trustee or executor in cases where some part of the trust property was situate within the jurisdiction of the Court.²

A company has been allowed to take power to lease³ or sell the whole of its undertaking, or to amalgamate with or purchase other undertakings,⁴ and in an unreported case each of two companies carrying on similar businesses obtained leave to take powers to amalgamate or enter into partnership arrangements.

In the case of a company formed for the purpose of protecting the rights of cyclists, an alteration to include the promotion of the interests of motorists whose aims would often conflict with those of cyclists was held not to be within the Act.⁵ But so long as the new business is not destructive of or inconsistent with the existing business, it may be sanctioned under (v) (page 38, *supra*), although different from and bearing no relation to the existing business. The question whether the proposed new business is one which can be conveniently and advantageously combined with a company's present business is one for determination by the company's managers and shareholders, subject, of course, to the control of the Court.⁶

Unless the opposition of dissentients is frivolous, they will be allowed their costs of opposing the petition, as the Court regards reasonable opposition as wholesome, though it may be unsuccessful.⁶

The sanction of the Court is sought by petition, on the presentation of which a summons must be taken out to have a day fixed for the hearing and for directions as to the advertisement of the petition.

When the alteration has been made and confirmed by the Court, an office copy of the Order confirming it, with a printed copy of the Memorandum as altered, must (under a penalty of ten pounds a day) be delivered to the Registrar of Companies within fifteen days of the date of the Order of the Court; and upon his registering the altered Memorandum, and issuing his certificate of the fact, it applies to the company as if it were registered with the altered Memorandum. If the altered Memorandum and Order are not registered within the prescribed time, the Court has power to enlarge the time for registration (Section 9, Sub-section 6).

¹ *Kirkcaldy Steam Laundry Co.*, [1905] 6 F. 776.

² *Munster and Leinster Bank*, [1907] 1 Ir. R. 237.

³ *Anglo-American Telegraph Co.*, [1911] 105 L. T. 947.

⁴ *New Westminster Brewery Co.*, [1911] 105 L. T. 946; *Marshall Sons & Co.*, [1919] W. N. 207.

⁵ *Cyclists' Touring Club*, [1907] 1 Ch. 269.

⁶ *Parent Tyre Company, Limited*, *in re*, [1923] 2 Ch. 222.

Companies registered without Articles from the 1st November, 1862, up to the 30th September, 1906, are governed by Table A as contained in the First Schedule to the Act of 1862; those registered on the 1st October, 1906, and up to the 31st March, 1909, by the Table A prescribed by the Board of Trade in 1906; and those registered on or after the 1st April, 1909, by the Table scheduled to the Act of 1908, which is substantially the same as that of 1906. In regard, however, to the earlier Tables, the various provisions of the Act of 1908 to a considerable extent vary the effect of the clauses.¹

The following rules apply where Table A is excluded and no other regulations are provided regarding the matters in question:—

- (1) Meetings may be held on seven days' notice being served on every member in the manner mentioned in Table A; (2) Any five members may summon a meeting; (3) Any person elected by the members present at a meeting may be the chairman thereof; and (4) Every member has one vote (Section 67).

The original Table A had become nearly obsolete, and prior to 1906 most companies adopted a complete set of special Articles. This is not now necessary, but large companies almost always adopt their own special regulations, when the Articles begin with a statement to the effect that "The following shall be the Articles of Association of the Company, to the exclusion of Table A in the First Schedule to The Companies (Consolidation) Act, 1908."

Other companies, instead of wholly excluding Table A, may adopt the suitable parts of that Table, with a few special Articles containing the desired modifications. In such cases the Articles commence with a statement to the effect that "The regulations contained in Table A in the First Schedule to The Companies (Consolidation) Act, 1908, shall be the Articles of Association of the Company, except in so far as they are modified by the following provisions." The special Articles are then set out, and the clauses of Table A which are not to apply are indicated by their numbers: *e.g.* "Clauses --- of Table A shall not apply." In cases of this kind it is a good plan to attach copies of Table A to the Articles, so that each member who obtains a copy may have the whole of the regulations before him. It may be observed that Table A, or such portions of it as are adopted, need not be registered.

The Articles must be printed and divided into paragraphs numbered consecutively (Section 12). They must be signed by each subscriber to the Memorandum and attested by a

¹ *E.g.* the statutory provisions as to requisitions for calling extraordinary meetings, the time of holding the first general meeting, and the appointment and duties of auditors contained in the Act override the regulations on those matters contained in the old Table A.

witness. They must be impressed with the same stamp as if they were contained in a deed, and a five-shilling registration fee stamp.

The Articles of a company, or any portion thereof, or the regulations contained in Table A, may, subject to the provisions of the Act of 1908 and to the conditions in the Memorandum, at any time be altered or set aside by special resolution, others being substituted as circumstances render necessary (Section 13). This is a power of which the company cannot deprive itself by a statement in the Articles of Association.¹ Any new Article may be adopted which could lawfully have been included in the original Articles.²

It has also been held that a contract outside the Articles that they shall not be altered does not deprive the company of the power to alter them, although the person with whom the contract was made may have a remedy in damages, or possibly be entitled to enforce the stipulations in his contract (*e.g.* the right to appoint a director) notwithstanding an alteration in the Articles which purports to deprive him of it.³ This decision was not followed by the Court of Appeal in a later case,⁴ and has therefore been treated as overruled.

"The decision of the Court of Appeal (in *Baily v. British Equitable Co.*⁵) therefore seems to me to be a clear authority for the proposition that a company may be restrained by injunction from altering its Articles of Association for the purpose of committing a breach of a contract, one of the terms of which is that the Articles shall not be altered."⁶

In any case it is clearly established that no majority of shareholders can by altering the Articles retrospectively affect, to the prejudice of non-consenting owners of shares, the rights

¹ *Walker v. London Tramways Co.*, [1879] 12 Ch. D. 705.

² *Sidebottom v. Kershaw, Loane & Co.*, [1920] 1 Ch. 154.

³ *Punt v. Symons & Co.*, [1903] 2 Ch. 506, following an unreported case in the Court of Appeal, *Mallison v. National Insurance Co.*, [1804] 1 Ch. 200, in spite of the head-note, is not an authority for this proposition.

⁴ *Baily v. British Equitable Assurance Co.*, [1904] 1 Ch. 374.

⁵ In this case the position of a stranger claiming rights defined by the Articles is considered. The case was reversed in the House of Lords, [1906] App. Ch. 35, but Lord Macnaghten said of the proposition "A company cannot by altering its Articles justify a breach of contract." "No one, I should think, would be inclined to dispute the proposition thus asserted, but with all deference that is not the question."

⁶ *British Muncie Syndicate v. Alperston Rubber Co.*, [1915] 2 Ch. 105, *per* Sargant, J. In this case the company had agreed that the plaintiff should as long as it held 5000 shares have the right to nominate two directors and that an Article to that effect should not be altered. The Court granted specific performance, and restrained the holding of a meeting to confirm a resolution altering the Articles.

already existing under a contract,¹ nor take away a right already accrued: e.g. after a transfer of shares is lodged the company cannot create a right of lien so as to defeat the transfer.² But every shareholder is presumed to know that rights conferred by the Articles alone are subject to alteration by special resolution of the company, and he cannot restrain such an alteration, even though to his own prejudice,³ unless the alteration would amount to a breach of contract or he can show that the alteration in the Articles is not made *bona fide* and for the benefit of the company as a whole; but it is far from easy to say in what cases there is a contract, for in the case last cited Lindley, M. R., says (at page 673): "A company cannot break its contracts by altering its Articles of Association; but when dealing with contracts referring to revocable Articles, and especially with contracts between a member of the company and the company respecting his shares, care must be taken not to assume that the contract involves as one of its terms an Article which is not to be altered"; and Vaughan Williams, L. J. (at page 676), said: "A resolution may alter the regulations of the company but cannot retrospectively affect existing rights. I take it to be clear that the alteration must be made in good faith, and I take it that an alteration in the Articles which involved oppression of one shareholder would not be made in good faith"; while Romer, L. J. (at page 679), shows that the Articles alone *may* confer on classes of shareholders rights which are unalterable without their consent. In the case of the issue of preference shares and the like there will almost always be outside the Articles a contract to be found in the terms of the offer and acceptance of the shares constituting a contractual right to the preferences or other privileges specified in the Articles.⁴

Apart from the question of affecting an existing contract the test of the legality of a proposed alteration applied by Lord Lindley, L. J., in *Allen v. Gold Reefs of West Africa*,⁵ is that the power to alter the Articles must be exercised "*bona fide* for the benefit of the company as a whole." As an instance of what cannot be done Peterson, J., has said: "The majority cannot alter the Articles in such a way as to place one or more of the minority in a position of inferiority, as, for instance, by attributing to his or their shares a smaller proportional share of the available profits

¹ *Per* Rigby, L. J., in *James v. Buena Ventura Syndicate*, [1890] 1 Ch. at page 406; *per* Lord Watson in *Wilton v. Saffery*, [1897] App. Ca. at page 309; *per* Vaughan Williams, L. J., *Allen v. Gold Reefs of West Africa*, [1900] 1 Ch. at page 676.

² *McArthur, Limited, v. Gulf Line*, [1900] S. C. 732, Court of Sess.

³ *Allen v. Gold Reefs of West Africa*, [1900] 1 Ch. 656.

⁴ See note ⁵ on page 45.

⁵ [1900] 1 Ch. 656, 671.

than that which the others receive, nor can it in my view confer on one or more of its own number benefits or privileges in which other shareholders of the same class do not participate."¹ The matter has been considered in the case of Articles giving to a majority power compulsorily to purchase the shares of one or a class of the members. It was held that an original Article giving the other members power to require the shares of a bankrupt member to be offered to them at a fair price was valid and binding,² as was an original Article requiring a member who failed to comply with certain trade regulations to sell one pound shares for one shilling³; and in case of the adoption of new Articles for a similar purpose the Court of Appeal held that it might be a *bona fide* exercise of the power to compel a member who traded in competition with the company to sell his shares to the other members at a fair price⁴; but it was held by Peterson, J., that the adoption of a new Article that any of the members (except a particular one) might be required without restriction to sell their shares to the other shareholders at a price to be fixed by the directors was not legitimate,⁵ and by Astbury, J., that a proposal to pass a similar Article affecting all members, binding them to sell at such price as would on the basis of past dividends give an average return of twelve and a half per cent. on the purchase price ought to be restrained⁶. In each of these cases the Court considered the test to be whether or not in the circumstances the proposal was *bona fide* for the benefit of the company as a whole, and not merely for the benefit of the majority.

Even when Articles have not been formally altered, the Court may have regard to a long course of practice, and recognise as valid Articles which have been used for many years, although not regularly adopted,⁷ and may also act upon a distribution of assets not in strict accordance with the Articles if there has been a general adoption of the method of distributing.⁸ Moreover, where an Article is one which the company has power to adopt, the fact that there has been a defect in the procedure of its adoption will not prevent a person dealing with the company on the faith of the Article from insisting that it shall be treated

¹ Dafen Tinsplate Co. v. Llanelly Steel Co., [1920] 2 Ch. at page 143.

² Borland's Trustee v. Steel Bros. & Co., [1901] 1 Ch. 279.

³ Phillips v. Manufacturers Securities, [1917] 116 L. T. 200.

⁴ Sidebottom v. Kershaw, Leese & Co., [1920] 1 Ch. 154.

⁵ Dafen Tinsplate Co. v. Llanelly Steel Co., [1920] 2 Ch. 124.

⁶ Brown v. British Abrasive Wheel Co., [1919] 1 Ch. 290.

⁷ Ho Tung v. Man On Insurance Co., [1902] App. Cas. 232.

⁸ *Somes v. Currie*, [1855] 1 K. & J. 605; *Beoston Pneumatic Tyre Co.*, [1898] W. N. 34,

14 Times L. R. 338; cases which were recognised in *North-West Argentine Railway Co.*, [1900] 2 Ch. 882.

as binding on the company, and the company can equally insist upon such Article where it has been made the basis of a contract with a stranger.¹

The Court will not at the instance of the company exercise its jurisdiction to rectify mistakes in the Articles, for the company has the power above mentioned to vary the Articles as registered²; it might, however, set right an injustice if a section of the members by their votes prevented the rectification of a mistake in preparing the Articles.

It has been pointed out that companies registered without Articles of Association before the 1st October, 1906, were governed by the original Table A, and there is still a large number of companies regulated by that Table, in some cases with and in others without modification. Those companies can now obtain the benefit of a modern set of Articles by passing a special resolution to the following effect:—"The existing regulations of the company are hereby rescinded, and in lieu thereof the regulations contained in Table A in the First Schedule to The Companies (Consolidation) Act, 1908, shall be the regulations for the management of the company." If it be desired to vary any of those regulations, there should be added to the resolution the words "subject to the modifications hereinafter set forth," after which the special Articles to give effect to the variations required will follow as part of the resolution.

In preparing Articles a solicitor must not insert unusual clauses in his own favour. A petition to wind up based on a claim arising out of such clauses was dismissed.³

In earlier editions of this book various matters were mentioned as being omitted from Table A. Most of those omissions have been made good in the new Table A, but the following points require attention:—

Minimum Subscription. Except in the case of a private company the Articles should fix the minimum subscription upon which the directors may go to allotment. Otherwise no allotment may be made unless the whole amount offered for subscription, or, if there is no public offer, the whole amount not agreed to be issued as fully or partly paid is applied for and the application money paid (Section 85, Sub-sections 1 and 7). Neither the old nor the new Table A contains the necessary clause.

Commission. If the company desires the right to pay a commission on an issue of shares to the public, power to do so must be taken in the Articles, and the amount or rate per cent. of such commission must be stated (Section 89). Neither the old nor the new Table A gives this power.

¹ *Muirhead v. Forth Insurance Co.*, [1904] App. Ca. 78.

² *Evans v. Chapman*, [1902] W. N. 78 86 L. T. 381.

³ *Rhodesian Properties*, [1901] W. N. 130.

Directors.—The original Table A declared that until directors were appointed the signatories to the Memorandum should be deemed to be directors (Clause 53). The new Table A has no similar provision, and until the signatories make an appointment there are no directors. Special Articles frequently name the first directors of the company; but no person may be so appointed unless he has, before registration of the Articles, by himself or an agent authorised in writing—(1) Signed and filed with the Registrar a Consent in writing to act as director; and (2) either signed the Memorandum of Association for or filed with the Registrar a Contract in writing to take from the company and pay for his qualification shares, if any (Section 72). This section, however, does not apply to a company registered before 1901, and "Private Companies" are exempt from its provisions.

The Articles frequently fix the directors' remuneration and qualification. The new Table A leaves the former to be fixed by the company in general meeting, and fixes the latter as "at least one share" (Clauses 69 and 70).

The new Table A repeats, in Clause 77, the provisions of the old Table A as to the disqualification of directors, but contains no words authorising directors to enter into contracts with their companies. Special Articles usually give this privilege to directors, but it is a dangerous one, and the provision of the Table is better. If this is conceded to directors, the London Stock Exchange requires that they should be precluded from voting upon matters in which they are interested.

Borrowing Powers. A trading company has implied borrowing powers¹; but what borrowing powers other companies have is not well defined (as to which see Book I., Chapter X., page 220 *et seq.*, *infra*). It is therefore advisable to define the borrowing powers of the company and how far they may be exercised by the directors without the consent of the company in general meeting. Sometimes, moreover, the total borrowing power of the company is strictly limited, the limit being useful as an inducement to persons to lend money within such limit. The London Stock Exchange requires a provision limiting the powers of the directors to borrow to be inserted in the Articles of companies desiring a quotation. This is fixed by the new Table A (Clause 73) at the amount of the issued share capital.

Preference Shares.—Where the company's capital is divided into various classes the respective rights of the holders should be set out, and it is convenient to take power for a three-fourths majority of any class to authorise a modification of the rights of such class (see page 25, *supra*). The latter power is conferred by Clause 4 of the new Table A. A power to modify rights does not include power to extinguish them.² Such a power is often useful, but must be specially taken.

Share Warrants to Bearer.—Sufficient powers are given by Clauses 35 to 40 of the new Table A for the issue of share warrants. In the case of private companies, however, these clauses must be excluded.

Increase of Capital, Reduction of Capital, Consolidation and Sub-division of Shares, and Conversion of Shares into Stock.—All these matters are adequately dealt with in the new Table A.

Lien on Shares.—Partners in a firm have a lien on the interest of the other members for moneys due from them as partners to the firm, but it has not been decided whether in the absence of an express Article

¹ General Auction Estate Co. v. Smith, [1891] 3 Ch. 482.

² Mercantile Investment Co. v. International Co. of Mexico, [1893] 1 Ch. 444.

there is such a lien in favour of a company; that there is no such lien in respect of liabilities other than those in respect of shares is well established.¹ Special regulations generally give the company a lien on the shares of a member for any debts due to the company from such member. The new Table A (Clause 9) gives a lien somewhat more restricted than was customary, but that clause appears to be a good one. Such a lien is valid,² and is often of great use where, large numbers of shares having been issued to vendors, disputes arise; and a lien on shares is enforceable even though the holders are trustees³; but the company cannot assert such a lien in respect of debts owing by a *cestui que trust* who is not the registered holder of the shares,⁴ and if the lien is given as against "the holder of the shares" this means the registered holder.⁵ A purchaser of shares subject to a lien is bound by it; but he may require the company to resort first to any shares remaining in the hands of a vendor.⁶ If a shareholder pays off the amount owing he may require the company to assign the lien to his nominee, for it is an equitable charge within the Conveyancing Act.⁷ A lien may be taken by altering the Articles after the issue of the shares,⁸ but it will not be effective against a transfer which is lodged before the resolution creating the lien is passed.⁹ A lien on shares is a security, and makes the company a secured creditor in the bankruptcy of a shareholder.¹⁰ So also directors who have power to lend only on security may do so on a lien upon the shares in the company held by the borrower unless forbidden so to do by the Articles.¹¹ The company is not entitled to enter either in its Register of Members or on the certificate of shares a note of any lien it may have.¹² The lien, if appropriate words are used in the Articles, extends to all liabilities, and not only to those in respect of the shares,¹³ and applies to a joint as well as a several debt,¹⁴ though a power to forfeit shares for nonpayment of debts other than calls is invalid (see *post*, page 435). It cannot be enforced in respect of a debt incurred after a transfer of the shares has been lodged (e.g. a call made after that date).¹⁵ If a bill has been taken for the amount of the debt the debt is not extinguished and the lien continues, unless it is by the Articles restricted to debts "payable."¹⁶ Whether the word "due" or "debt" imports money immediately payable will depend on the context.¹⁷ If the lien is only for moneys presently payable it cannot be enforced in respect of bills of exchange which have not matured.¹⁷ If the Articles declare that a call is to be deemed to be made when the directors' resolution is passed,

¹ *Murray v. Pinkett*, [1845] 12 Ch. & F. 764, *Dunlop v. Dunlop*, [1882] 21 Ch. D. 583.

² *Bank of Africa v. Salisbury Gold Co.*, [1892] App. Ct. 281, *Bradford Banking Co. v. Briggs*, [1886] 12 App. Ct. 29, *re Macmurdo*, [1892] W. N. 73.

³ *London and Brazilian Bank v. Brocklebank*, [1882] 21 Ch. D. 302.

⁴ *Re Perkins*, [1890] 24 Q. B. D. 613.

⁵ *Paul's Trustee v. Justice*, [1912] S. C. 1303, Court of Sess.

⁶ *Gray v. Stone*, [1893] W. N. 133, 69 L. T. 282.

⁷ *Everitt v. Automatic Weighing Machine Co.*, [1892] 3 Ch. 506.

⁸ *Allen v. Gold Reefs of West Africa*, [1900] 1 Ch. 656.

⁹ *McArthur, Limited, v. Gulf Lane*, [1909] S. C. 732, Court of Sess.

¹⁰ *Re Colhe*, [1876] 3 Ch. D. 481.

¹¹ *National Bank of Wales*, [1899] 2 Ch. 629.

¹² *W. Key & Son*, [1902] 1 Ch. 167.

¹³ *Ex parte Stringer*, [1882] 9 Q. B. D. 436.

¹⁴ *Bentham Mills Spinning Co.*, [1879] 11 Ch. D. 900.

¹⁵ *Cawley & Co.*, [1880] 42 Ch. D. 209.

¹⁶ *London Birmingham &c. Bank*, [1865] 31 Beav. 332.

¹⁷ *Stockton Malleable Iron Co.*, 1875, 2 Ch. D. 101.

the lien attaches at once,¹ unless the lien is restricted to debts "due and payable."²

The principle of marshalling applies to a lien, and if some of the shares are transferred the company must resort first to those remaining vested in the debtor.³ Such a lien by the company takes priority of all charges created by the shareholder, except that if the company has given credit to the shareholder after knowing that the shares are mortgaged, the claim in respect of such credit will be postponed to the charge of which the company had notice.⁴

Compulsory Sale.—A clause enabling the company to compel a member to sell his shares, even at a price less than their value, is good, and can be enforced.⁵

Winding Up.—An Article defining the rights of various classes of shareholders in the distribution of assets upon a winding up will often save much uncertainty and doubt; but it must not purport to take away rights given by Statute: e.g. those conferred on dissentients by Section 192.

The adoption of the new Table A where possible is very advisable, as there is great convenience in having identical Articles for various companies, so that they may become well known and understood.

Every company is bound to supply any of its Members, on request, with a copy of its Memorandum of Association, having annexed thereto its Articles of Association (if any), upon payment of a sum not exceeding one shilling. The penalty in case of default is one pound for each offence (Section 18).

Table A is part of the Act, and accordingly companies may safely adopt any operative regulations contained therein, or analogous thereto, without fear of such regulations proving invalid.⁶ The Board of Trade may, however, under Section 118, alter any of the Tables or Forms in the First Schedule.

Articles of Association sometimes authorise the directors to make, vary, and repeal by-laws for the regulation of the business of the company, its officers and servants, or the members of the company. It would seem, however, that by-laws for the regulation of the *members* of a company are "regulations for the *company*" within the meaning of Section 10, and that such by-laws can only be made, varied, or repealed by special resolution. If the Articles of a new company permit the making of such by-laws the Registrar requires the following qualification to be added:—"Provided that no by-law shall be made under this power which would amount to such an addition to or modification of the Articles of Association as could only legally be made by a special resolution, passed and confirmed in accordance with the provisions of Section 69 of The Companies (Consolidation) Act, 1908."

¹ *Dawe's Case*, [1868] 38 L. J. Ch. 512.

² *Orpen's Case*, [1863] 9 Jur. N. S. 615.

³ *Gray v. Stone*, [1883] W. N. 133, 69 L. T. 282.

⁴ *Bradford Banking Co. v. Briggs*, [1886] 12 App. Ca. 20.

⁵ *Phillips v. Manufacturers Securities, Limited*, [1917] 86 L. J. Ch. 305, 116 L. T. 290; and see page 17, *supra*.

⁶ *Lock v. Queensland Investment and Mortgage Co.*, [1896] App. Ca. 461.

The following form of Articles will suffice for a company desiring not to incur the expense of registering a complete set of special regulations:—

ARTICLES OF ASSOCIATION OF THE COMPANY, LIMITED.

1. The regulations of the company shall be those contained in Table A in the First Schedule to The Companies (Consolidation) Act, 1908 (hereinafter called "Table A"), subject to the additions and modifications hereinafter set forth.
 2. The minimum subscription upon which the directors may proceed to allotment in the case of the first allotment of any shares payable in cash shall be shares to the nominal value of £
 3. It shall be lawful for the company to pay to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, a commission of per share [or a commission at the rate of ten per cent. on the nominal amount of the shares so subscribed or agreed to be subscribed, or the subscription whereof is so procured or agreed to be procured].
 4. The first directors of the company shall be A. B., C. D., and E. F., who shall hold office until the ordinary general meeting in the year 19 , unless disqualified as provided by Clause 77 of Table A. At the said general meeting, and at the ordinary general meeting in every subsequent year, one third of the directors, or if their number is not three or a multiple of three then the number nearest to one third, shall retire from office in the manner provided in Table A.
- [Or 4. Until the first directors are appointed the subscribers of the Memorandum of Association shall have all the powers of directors of the company, but shall act without remuneration.]
5. The directors' remuneration shall be at the rate of £ per annum, and shall be divisible among the directors in such proportions as they shall determine, or in default of determination equally. A resolution of the board to forego or reduce or postpone the payment of their remuneration, or any part thereof, shall bind all the directors.
 6. The qualification of a director shall be the holding, in his own right, of shares to the nominal value of not less than £ . A first director may act before acquiring his qualification, but shall acquire the same within two months [or one month] after his appointment.

If the company is a Private Company it must by its Articles restrict the right to transfer its shares, limit the number of members (exclusive of employés and certain ex-employés) to fifty, and prohibit any invitation to the public to subscribe for shares or debentures (see page 449, *infra*). It must also exclude the Clauses of Table A (35 to 40) authorising the issue of share warrants, since, under instructions from the Board of Trade, the Registrar refuses to register companies as "Private" which take power to issue share warrants, for in such case there could be no restriction on the transfer of the shares specified in the warrants. The second of the foregoing special Articles should also be omitted, as no minimum subscription is required in the case of a Private Company.

CHAPTER IV.

ASSURANCE COMPANIES.¹

SINCE the year 1870 Life Assurance Companies have been subject to special legislation,² which has been extended to other Assurance Companies, and by The Assurance Companies Act, 1909 (9 Edw. VII. c. 49), the law has been further extended and consolidated as from the 1st July, 1910.³

This Act applies not only to companies in the proper sense of the word, but extends (Section 1) "to all persons or bodies of persons, whether corporate or unincorporate, not being registered under the Acts relating to Friendly Societies or to Trade Unions, . . . whether established before or after the commencement of this Act, and whether established within or without the United Kingdom, who carry on within the United Kingdom Assurance business of all or any of the following classes: -

- (a) Life Assurance business
- (b) Fire Insurance business
- (c) Accident Insurance business
- (d) Employers' Liability Insurance business
- (e) Bond Investment business."

And every company registered under the Companies Acts which transacts Assurance business of any of the above classes in any part of the world is included.

It will therefore be seen that a single person or a partnership may be an Assurance Company within the meaning of the Act, and the Eighth Schedule contains special provisions for members of Lloyds or "of any other association of underwriters approved by the Board of Trade."

The definitions of the various classes of Assurance Companies, with the particular provisions relating thereto, are given below under their respective headings.

¹ This chapter is largely taken, with the Author's consent, from "The Law Relating to Assurance Companies," by Major ERIC GORE-BROWNE, B.A., published by JORDAN & SONS, LIMITED.

² The Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61); The Life Assurance Companies Act, 1871 (34 & 35 Vict. c. 58); The Life Assurance Companies Act, 1872 (35 & 36 Vict. c. 41); The Industrial Assurance Act, 1923 (13 & 14 Geo. 5, c. 8).

³ Insurance Companies are excepted from the definition of moneylenders in The Money-lenders Act, 1900 (see Section 6, quoted in relation to Banking Companies on page 71, *infra*).

DEPOSITS

Every Assurance Company, including existing companies,¹ must deposit and keep deposited² with the Paymaster-General the sum of £20,000,³ which is to be invested in such of the securities usually accepted by the Court as the company may select, and the interest accruing due on any such securities shall be paid to the company (Section 2, Sub-sections 1 and 2). When the deposit has been made the company applies for an order that the interest be paid to it. Applications relating to the investment of the fund or variations in its investment and as to payment of interest are made by petition.⁴ In the case of a company under the Companies Acts the Registrar may not issue a certificate of incorporation until the deposit has been made (Section 2, Sub-section 3); but the deposit may be made by the subscribers of the Memorandum or any of them and on the incorporation of the company it becomes part of the assets of the company (*ibid*).⁵

Where a company carries on or intends to carry on more than one class of assurance business, the company must deposit and keep deposited a separate sum of £20,000 in respect of each class of such business (Section 2, Sub-section 4), but there are certain exceptions to this rule, which will be found under the headings of the various classes of companies below.⁶

¹ The provisions here set out with regard to deposits do not apply to Fire Insurance business (Section 31, Paragraph (f)), or to Accident Insurance business (Section 32, Paragraph (b)) if the company commenced to carry on such business in the United Kingdom before the passing of the Act, nor do they apply to certain Mutual Insurance Companies coming within the operation of Section 31, Paragraph (c), and Section 33, Sub-section (1), Paragraphs (a) and (b). They apply to collecting societies and industrial assurance companies carrying on industrial insurance business (Industrial Assurance Act, 1923 Sections 7 and 12).

Under the Life Assurance Companies Acts 1870-1872, the deposit was returnable when the Life Assurance Company annuities reached £10,000. There is no similar provision with regard to life assurance companies in this Act. The Board of Trade Order of 6th June, 1910, Rule 7, provides for repayment in case of other classes of insurance business, in the case of fire and accident insurance when the company makes a deposit in respect of any other class of business, and in the case of employers liability and bond investment business when such further deposit is made and the accumulated insurance fund amounts to £10,000. It has been suggested that in the event of a fall in the securities in which the deposit is invested the result of which is to bring the value of the deposit under £20,000 the Paymaster-General may require the sum to be made up. This does not appear to be correct.

² Underwriters being members of the Lloyds, or of any other association approved by the Board of Trade, are allowed to deposit only £2,000 (Eighth Schedule).

³ Board of Trade Order 1910 (Section 4). Royal Exchange Co., [1910] W. N. 211, English and Scottish Law Life Association, [1913] W. N. 144. A separate petition must be presented on the occasion of each variation.

⁴ In regard to any company to be formed after the Act whose Memorandum includes powers to carry on insurance business of any of the above classes, the certificate of incorporation will not be issued until the deposit is made. In the case of a company formed before the Act having powers to transact fire insurance, accident insurance or bond investment business, no deposit will be payable unless it in fact carries on such business within the United Kingdom for the Act applies only to those companies which carry on the businesses described in Section 1, and not to those which merely have power to do so without in fact exercising them.

⁵ For Rules of the Board of Trade in relation to deposits see Board of Trade Order of 6th June, 1910.

A company transacting other business besides that of assurance, or transacting more than one class of assurance business, must keep a separate account (Section 3) of all receipts in respect of the assurance business or of each class of assurance business, and the receipts must be carried to and form a separate assurance fund with an appropriate name; but this does not render it necessary that the investments of any such fund should be kept separate from the investments of any other fund. This provision does not prevent expenses of management and other proper outgoings being paid out of such receipts, for the Form of Accounts in the First Schedule to the Act contains headings for "Commission," "Expenses of Management," and "Other Payments (accounts to be specified)."

It is further provided that the fund created in the above manner "is to be as absolutely the security of the policy holders of that class as though it belonged to a company carrying on no other business than assurance business of that class, and shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of assurance of that class, and shall not be applied, directly or indirectly, for any purposes other than those of the class of business to which the fund is applicable" (Section 3, Sub-section 2)¹; and by Section 2, Sub-section 4, the deposit of £20,000 made in respect of any class of business in respect of which a separate assurance fund is required to be kept shall be deemed to form part of that fund, and all interest accruing due on the deposit must be carried by the company to that fund.

There are no words to be found in the Act which deal with the disposition of the fund and the deposit after all liabilities to policy holders properly chargeable against it have been satisfied, but the Board of Trade has power under Section 2 to make rules as to "the withdrawal and transfer of deposits," and by Order of 6th June, 1910, Clause 7, it is declared that where the company has ceased to carry on assurance business in the United Kingdom of the class for which the deposit is made the Court may order the deposit fund to be paid out to the company or as it shall direct, where "all liabilities in respect of the deposit fund have been satisfied or are otherwise provided for." The liabilities may be "provided for" by another company taking over the contracts, but the Court will not usually consider this sufficient unless the policy holders have individually consented to accept the new company's undertaking. It seems clear that

¹ Under this sub-section *Neville, J.* held that the deposit was available for paying the costs of liquidation and sums deposited by the Liquidator as security for costs in connection with actions relating to the life assurance business (*National Standard Life Corporation*, [1917] 1 Ch. 198).

the balance of the fund and deposit must belong to the company, but it is not clear how far, if at all, other creditors of the company would have a claim upon it. The words cited above from Section 3, Sub-section 2, appear to ear-mark the fund and so exempt it from the claims of creditors in respect of other classes of business than that for which the fund was formed.

There was a provision in Clause 7 of The Life Assurance Companies Act, 1872, that the mere payment of premiums to a company taking over the contracts of the old company, or the doing of any other act, should not amount to a release of the old company and acceptance of the new liability unless the same was signified by some writing signed by the policy holder or his agent. This is not repeated in the Act of 1909, and it would seem that a novation releasing the old company and accepting the liability of the purchasing company may be made in the same way as might be done in the case of any other contract.

ACCOUNTS, VALUATION, AND STATEMENT OF INSURANCE BUSINESS.

The Act contains very particular provisions with regard to the keeping and rendering of accounts by assurance companies. They must at the end of each financial year prepare (a) a Revenue Account, (b) a Profit and Loss Account,¹ and (c) a Balance Sheet, in each case in the forms set out in the First, Second, and Third Schedules to the Act.

Every assurance company, other than an accident insurance company (which is exempted by Section 32) and an employers' liability insurance company (which is exempted by Section 33), must once in every five years, or at such shorter intervals as may be prescribed by the instrument constituting the company, and in particular whenever an investigation into the financial condition of the company is made with a view to the distribution of profits or the results of which are made public, "cause an investigation to be made into its financial condition, including a valuation of its liabilities, by an actuary," and "cause an abstract of the report of such actuary to be made in the form" given in the Fourth Schedule to the Act (Section 5).

The company, except in the case of fire insurance business, must also prepare a statement of its assurance business at the date to which the accounts are made up, for the purposes of the above investigation, in the form given in the Fifth Schedule, but so that if the investigation is made annually the statement may be made only once in every five years (Section 6).

¹ A company which carries on assurance business of one class only, and no other business, is exempted from the obligation to prepare a Profit and Loss Account (Section 4, Sub-section (b)).

A fire insurance company is, by Section 31, Sub-section (a), exempted from making any statement of its fire insurance business in accordance with the Fourth and Fifth Schedules; but an accident insurance company, although exempted from the remaining provisions of Sections 5 and 6, is required by Section 32, Sub-section (a), to prepare annually, and cause to be printed, signed, and deposited with the Board of Trade, a statement of its accident insurance business in the form set out in the Fourth Schedule; and an employers' liability insurance company, although similarly exempted, is required by Section 33, Sub-section (c), to prepare annually, and cause to be printed, signed, and deposited at the Board of Trade, a statement, in the form set forth in the Fourth Schedule, of its employers' liability insurance business, and "to cause an investigation of its estimated liabilities to be made by an actuary, so far as may be necessary to enable the provisions of that form to be complied with."

These accounts, balance sheet, abstract, and statement must be printed, and four copies (one of which must be signed by the chairman and two directors of the company, by the managing director, if any, and by the principal officer) must be deposited at the Board of Trade within six months after the period to which they relate; but this period may be extended by the Board to nine months if the circumstances are such that in their opinion a longer period should be allowed. If any report on the affairs of the company is made to the shareholders or policy holders this must also be deposited. In the case of a company registered under the Companies Acts, the company may send to the Registrar of Companies a copy of its accounts and balance sheets, and in such case is relieved from fulfilling the requirements of Sub-section 3 of Section 26 of The Companies (Consolidation) Act, 1908, as to filing a statement in the form of a balance sheet (Section 7).

Any shareholder or policy holder of the company may require a copy of the accounts, balance sheet, abstract, and statement to be sent to him by post or otherwise (Section 8).

In Sections 9, 10, and 11 will be found provisions relating to companies not formed under the Companies Acts in regard to audit, keeping a shareholders' address book, and furnishing copies of the deed of settlement or other instrument constituting the company.

Any assurance company publishing a statement of the amount of its authorised capital must include a statement of the amount subscribed and the amount paid up (Section 12). This is an important provision, seeing that an authorised capital of £1,000,000 may have only £10,000 subscribed and £2000 paid up.

AMALGAMATION OF ASSURANCE COMPANIES.

The Amalgamation¹ of Assurance Companies, or the transfer of the assurance business of any class from one assurance company to another, is provided for and carefully hedged round with safeguards adapted from those in the Life Assurance Companies Acts. These provisions are to be found in Sections 13 and 14, and are as follows:—

No amalgamation or transfer can take place unless (a) the company has power under its constitution to effect the transfer or amalgamation,² and (b) application is made to the High Court of Justice in England or Ireland or the Court of Session in Scotland by petition of the directors of any one or more of the companies³ to sanction the proposed arrangement (Section 13, Sub-sections 1 and 2). The section prohibiting a transfer without the sanction of the Court appears only to contemplate a transfer of the whole of the assurance business of any one class without any fresh contracts with the policy holders.⁴ The Court is not, it would seem, concerned with a case where by consent of each individual policy holder his contract with the old company is determined and a new contract is made with the transferee company⁵; but in such a case there may be grave difficulties in the way of the old company transferring any of its assets to the transferee company as a consideration for undertaking the liability upon existing policies. This may be got over in cases where the policies have a surrender value, for there can be no objection to an arrangement with individual policy holders that they surrender their policies, and the appropriate amount is at their request paid to the transferee company in consideration of its making with the policy holder a more favourable contract than would otherwise be possible. But no scheme of arrangement having this object could be made binding under this Act on a policy holder who does not voluntarily consent, and it is doubtful whether the Court would sanction such a scheme under Section 120 of The Companies (Consolidation) Act, 1908.

¹ "Amalgamation" is a word that can scarcely be applied to the union of incorporated companies unless effected by Act of Parliament, but a transfer of the undertaking of one company to another is in effect the amalgamation of the two. An assurance company is, however, not necessarily incorporated, and two firms can of course easily amalgamate.

² *Sovereign Life Assurance Co.*, [1889] 42 Ch. D. 640; but cf. *Argus Life Assurance Co.*, [1888] 39 Ch. D. 571. It is sufficient if the constitution of the company is such that it can alter its regulations so as to authorise the proposed transfer.

³ For an example of such a petition see *London and Southwark Insurance Corporation*, [1880] 42 L. T. 247. It has been held in Scotland that the Order may be made on the petition of the company (*Empire Guarantee Corporation*, [1911] S. C. 1296, Court of Sess.).

⁴ *Sovereign Life Assurance Co.*, [1889] 42 Ch. D. 640.

⁵ *Swinfen Eady, J.*, took this view in the case of the *Progressive Assurance Co.* [20th October, 1909]. But in Scotland such a transaction was held to be a transfer of the business (*Empire Guarantee Corporation*, [1911] S. C. 1296, Court. of Sess.).

Before application is made to the Court to sanction the proposed amalgamation or transfer, the company must (A) advertise notice of its intention to make the application in the *Gazette*; (B) in the case of a transfer of life assurance business or bond investment business, and unless the Court otherwise directs,¹ send the reports below mentioned to each policy holder whose policy is in the nature of life endowment, sinking fund, or bond investment; and (C) keep open for inspection of the policy holders or shareholders the agreement or deed under which the amalgamation or transfer is effected for fifteen days after the publication of the notice in the *Gazette* (Section 13, Sub-section 3 (a), (b), and (c)).

The documents to be sent to the policy holders of a life assurance or bond investment company are—(1) a statement of the nature of the amalgamation or transfer; (2) an abstract containing the material facts embodied in the agreement or deed under which the amalgamation or transfer is proposed to be effected; and (3) copies of the actuarial or other reports upon which the agreement or deed is founded, including a report of an independent actuary (Section 13, Sub-section 3 (b)).

After hearing the directors and other persons whom it considers entitled to be heard upon the petition, the Court may, if it is satisfied that no sufficient objection to the arrangement has been established, sanction the arrangement (Section 13, Sub-section 2), and no amalgamation or transfer is lawful without such sanction (Section 13, Sub-section 4).

When the amalgamation or transfer takes place, the following certified copies and documents must be sent to the Board of Trade:—(A) copies of the statements of the assets and liabilities of the companies concerned, with a statement of the nature and terms of the amalgamation or transfer; (B) a copy of the agreement or deed under which the amalgamation or transfer is effected; (C) copies of the actuarial or other reports upon which the agreement or deed is founded; and (D) a declaration under the hand of the chairman and the principal officer of each company that every payment made to any person on account of the amalgamation is therein set forth, and that no further payments have been or are to be made in relation thereto (Section 14).

When a transfer to a new company is made the deposit made by the transferring company remains a security for the holders of

¹ Where a large, well-established company takes over the business of a comparatively small company it is not unusual to allow the purchasing company to omit sending particulars to all its policy holders, evidence being given that the number is very large and the expense would be great; but it must be shown that other steps are taken to inform the policy holders of the arrangement (*Hearts of Oak and General Assurance Co.*, [1911] 58 S. J. 443). See also report of this case, [1914] W. N. 172, 30 T. L. R. 436. Eve, J., refused the application on the ground of insufficient information being given.

its policies, and only when these have been satisfied can the purchasing company obtain payment of the amount deposited.¹ An order for specific performance of an agreement to transfer the business and deposit will, however, be decreed notwithstanding this incumbrance.² The vendor company ought not to be dissolved while any liabilities remain unsatisfied³; but Section 7 of The Life Assurance Companies Act, 1872, is no longer in force, and a novation may be effected with the purchasing company which will release the selling company.⁴

The provisions of the Act relating to the amalgamation of assurance companies do not apply where the only classes of assurance business carried on by both the companies are fire insurance business, or fire insurance business and accident insurance business, or *vice versa* (Section 31, Sub-section (f), and Section 32, Sub-section (e)).

It will be observed that, except in the case of life assurance companies as mentioned below, no meetings of policy holders are directed and no consent is required from them, and any opposition on their part must be by appearing in Court on the hearing of the petition; but "the Court shall not sanction the amalgamation or transfer in any case in which it appears to the Court that the life policy holders representing one tenth or more of the total amount assured in the company dissent from the amalgamation or transfer"⁵ (Section 30, Sub-section (d)). There is no provision for the manner of ascertaining the existence of such dissent; but no doubt the Court could, and in a proper case would, direct the holding of a meeting of policy holders, or their dissent might be evidenced by replies received from them to a circular, and the Court would take care that no injustice is done.

Friendly Societies are not under the Assurance Companies Acts, and amalgamations or transfers of their business are subject to the provisions of The Friendly Societies Act, 1896, Sections 70 and 71. Where a Friendly Society carries on industrial assurance business, these sections are modified by The Industrial Assurance Act, 1923, Sections 36 and 37.

In the case of assurance companies incorporated under the Companies Acts the sanction of the Court under the Assurance Companies Act will not dispense with the necessity of the passing of such resolutions as would be necessary if the company were parting with its undertaking in any ordinary case.⁶

¹ City of Glasgow Assurance Co., [1916] 2 Ch. 557.

² United London Insurance Co. v. Omnium Insurance Co., [1915] 81 L. J. (Ch.) 777.

³ But see London and Southwark Insurance Corporation, [1880] 42 L. T. 247.

⁴ See Sovereign Life Assurance Co., [1880] 42 Ch. D. 540.

FOREIGN ASSURANCE COMPANIES.

Section 274 of The Companies (Consolidation) Act, 1908, which requires companies established outside the United Kingdom to file certain returns, and provides for the sufficient service of notices, is by Section 19 of the Assurance Companies Act extended to assurance companies, whether incorporated or not, which are constituted outside the United Kingdom, and carry on assurance business within the United Kingdom.

PENALTIES.

There are heavy penalties for default in complying with the requirements of the Act, and they are enforceable, not only against the company, but against any director, manager, or secretary, or other officer or agent of the company, knowingly a party to the default, and are recoverable in the same manner as penalties imposed by The Companies (Consolidation) Act, 1908 (see page 613, *infra*), Sections 23 and 25. In the case of a default continuing for a period of three months after notice of default by the Board of Trade, published in one or more newspapers, the default will be a ground on which the Court may order the winding up of the company (Section 23).

In the case of a falsification of any account, balance sheet, abstract, statement, or other document required by the Act in any particular, to the knowledge of the person signing it, that person is guilty of a misdemeanour and liable to fine or imprisonment or to both (see Section 24 of The Assurance Companies Act, 1909, and Sections 5 and 17 of The Perjury Act, 1911, and the Schedule to that Act).

SPECIAL PROVISIONS.

1. LIFE ASSURANCE COMPANIES.

Life Assurance business is defined (Section 1) as “the issue of, or the undertaking of liability under, policies of assurance upon human life, or the granting of annuities upon human life,”¹ and in the case of a life assurance company a “policy on human life” is defined (Section 30, Sub-section (a)) as “any instrument by which the payment of money is assured on death (except death by accident only) or the happening of any contingency dependent on human life, or any instrument evidencing a contract which is subject to payment

¹ By Section 29 it is declared that the expression “annuities on human life” does not include superannuation allowances and annuities payable out of any fund applicable solely to the relief and maintenance of persons engaged, or who have been engaged, in any particular profession, trade, or employment, or of the dependants of such persons. This appears to exclude the granting of pensions out of a fund from the definition of life assurance, but leaves an ordinary contract by an employer to give a pension for life within the definition.

of premiums for a term dependent on human life"; and by Section 30, Sub-section (b), "Where the company grant annuities upon human life, 'policy' shall include the instrument evidencing the contract to pay such an annuity, and 'policy holder' includes annuitant."

It will be noted that insurances against death arising by accident, being included under accident insurance (see *infra*), do not fall within this class of business, and that what are known as leasehold redemption policies, or other contracts for payment of a sum at a fixed future date in return for periodic payments meantime, are not included unless the contingency of death is in some way involved. But if the premiums are to cease on death, or the time for payment of the capital sum is accelerated by death, or some other benefit accrues upon death (*e.g.* the premiums are to be returned), the Act applies as in the case of life insurance.¹ The ordinary endowment policy, insuring payment of a sum at the age of sixty or death, is within the definition of life insurance.²

An existing life assurance company which has previously made the £20,000 deposit required by the Life Assurance Companies Acts, 1870 to 1872, and subsequently withdrawn it under the provisions of those Acts, or been exempted from making any deposit under any of the repealed enactments, is required to renew and maintain the deposit (Section 30, Sub-section (c)), and there are now no provisions allowing the withdrawal of the deposit on the accumulation of a specified life fund or otherwise; but there are certain exemptions in regard to life assurance companies formed before 9th August, 1870.

The manner of valuing life policies and annuities in case of a winding up is provided by Section 17 and the Sixth Schedule, and applies although death has occurred between the winding up and the proof.³

2. FIRE INSURANCE COMPANIES.

Fire Insurance business is defined (Section 1) as "the issue of, or the undertaking of liability under, policies of insurance against loss by or incidental to fire," and a company carrying on such business is exempted from the necessity of preparing any statement of its fire insurance business in accordance with the Fourth and Fifth Schedules of the Act (Section 31, Sub-section (a)); nor do the provisions of the Act relating to deposits apply if the company has commenced to carry on fire insurance

¹ *Joseph v. Law Integrity Co.*, [1912] 2 Ch. 581; *Flood v. Irish Provident Co.* (an Irish case, reprinted), [1912] 2 Ch. 597.

² *Prudential Insurance Co. v. Inland Revenue Commissioners*, [1904] 2 K. B. 658.

³ *Law Car and General Insurance Corporation*, [1913] 2 Ch. 103.

business within the United Kingdom before the passing of the Act, or if the company is an association of owners or occupiers of buildings or other property, and satisfies the Board of Trade that it is carrying on business wholly or mainly for the mutual insurance of its members against damage by or incidental to fire caused to the houses or property owned by them (Section 31, Sub-sections (b) and (c)).

No deposit is required in respect of fire insurance business when the company has already made a deposit in respect of any other class of insurance business, and where a fire insurance company, after making a deposit, commences to carry on life assurance business, or employers' liability insurance business, the company may transfer the deposit to the account of that other business (Section 31, Sub-section (d)).

A fire insurance company which transacts other business besides assurance business is not bound (Section 31, Sub-section (e)) to keep a separate fund as respects fire insurance business, notwithstanding the provision of Section 3 that all receipts of each class of assurance business are to be paid into a separate fund; nor do the provisions of the Act with regard to amalgamation and transfer apply where the only business carried on by each of the companies amalgamating or the only business transferred is fire insurance (Section 31, Sub-section (f)).

In case of a winding up the right of proof in respect of claims which have not emerged before the winding up is only for a proportion of the premium unexpired, and this applies even when a fire has happened between the winding up and the proof.¹

3. ACCIDENT INSURANCE COMPANIES.

Accident Insurance business is defined (Section 1) as "the issue of, or the undertaking of liability under, policies of insurance upon the happening of personal accidents, whether fatal or not,² disease, or sickness, or any class of personal accidents, disease, or sickness."

By Section 32, Sub-section (f), in the case of accident insurance business the expression "policy" is declared to include "any policy under which there is for the time being an existing liability already accrued, or under which a liability may accrue," and by Section 32, Sub-section (g), "where a sum is due, or a weekly or other periodical

¹ Law Car and General Insurance Corporation, [1913] 2 Ch. 103; Assurance Companies Act, 1909, Section 17 and Schedule VI.

² Before 1900 insurance against fatal accidents was treated as life assurance. It is now expressly excluded from the definition of life assurance, and included as accident insurance.

payment is payable, under any policy, the expression 'policy holder' includes the person to whom the sum is due or the weekly or other periodical payment payable."

A company carrying on accident insurance business, instead of complying with the provisions of Sections 5 and 6, must annually prepare and deposit with the Board of Trade a statement of its accident insurance business in the form set out in the Fourth Schedule to the Act (Section 32, Sub-section (a)).

The provisions of the Act relating to deposits do not apply to the accident insurance business of the company if the company commenced to carry on such business in the United Kingdom before the passing of the Act (Section 32, Sub-section (b)); nor is it necessary for the company to make a deposit in respect of accident insurance business where it has already made a deposit in respect of any other class of insurance business; and where an accident insurance company, after making a deposit, commences to carry on life assurance or employers' liability insurance business, the company may transfer the deposit to the account of that other business (Section 32, Sub-section (c)).

An accident insurance company which transacts other business besides assurance business, or more than one class of assurance business, is not bound to keep a separate fund in respect of accident insurance business (Section 32, Sub-section (d)); nor do the provisions of the Act with regard to amalgamation and transfer apply where the only business carried on by the amalgamating companies is accident insurance or fire insurance, or these two together, or the business transferred is accident insurance business (Section 32, Sub-section (e)).

In case of a winding up the right of proof in respect of claims which have not emerged at the time of the winding up is limited to a return of a proportion of the premium.¹

4. EMPLOYERS' LIABILITY INSURANCE COMPANIES.²

Employers' Liability Insurance business is defined (Section 1) as "the issue of, or the undertaking of liability under, policies insuring employers against liability to pay compensation or damages to workmen in their employment"; and by Section 33, Sub-sections (g) and (h), it is declared that the terms "policy"

¹ Assurance Companies Act, 1909, Section 17, and Schedule VI.; Law Car and General Insurance Corporation, [1913] 2 Ch. 103.

² The section of the Act (Section 33) relating to employers' liability insurance companies embodies the provisions of The Employers' Liability Insurance Companies Act, 1907 (7 Edw. VII. c. 46), which is now repealed.

and "policy holder" shall have a meaning which is precisely similar to the meanings of those terms which are given above under the heading "ACCIDENT INSURANCE COMPANIES."

The provisions of the Act do not apply to employers' liability insurance business where the company carrying on such business is an association of employers which satisfies the Board of Trade that it is carrying on business wholly or mainly for the purpose of the mutual insurance of its members against liability to pay compensation or damages to workmen in their employ, either alone or in conjunction with any other risk incident to their trade or industry (Section 33, Sub-section 1 (a)), nor where the company carries on employers' liability insurance business as incidental only to marine insurance business (Section 33, Sub-section 1 (b)).

An employers' liability insurance company is exempted from the necessity of complying with Sections 5 and 6 of the Act, but must "annually prepare a statement of its employers' liability insurance business in the form set forth in the Fourth Schedule," and must "cause an investigation of its estimated liabilities to be made by an actuary so far as may be necessary to enable the provisions of that form to be complied with" (Section 33, Sub-section 1 (c)).

The company is also exempted from complying with the provisions of the Act relating to deposits if it commenced to carry on its business in the United Kingdom before the 28th August, 1907¹ (Section 33, Sub-section 1 (d)); and if the company has made a deposit in respect of any other class of insurance business, and its employers' liability fund has amounted to £40,000, the company may claim a return of the money deposited in respect of its employers' liability insurance business, and need not keep any money deposited in respect of that business so long as it has money deposited in respect of any other class of assurance business (Section 33, Sub-section 1 (e)).

In the case of a company carrying on employers' liability insurance business outside the United Kingdom the business carried on abroad is not treated as part of the business carried on by the company for the purposes of the Act (Section 33, Sub-section 1 (f)).

In case of a winding up the right of proof in respect of claims which have not emerged before the winding up is limited to a return of the proportion of the premiums unexpired.²

¹ The 28th August, 1907, is the date on which the Employers' Liability Insurance Companies Act was passed.

² Assurance Companies Act, 1909; Law Car and General Insurance Corporation, [1913] 2 Ch. 103.

5. BOND INVESTMENT COMPANIES.

Bond Investment business¹ is defined by Section 1 of The Assurance Companies Act, 1909, as "the business of issuing bonds or endowment certificates by which the company, in return for subscriptions payable at periodical intervals of two months or less, contracts to pay the bondholder a sum at a future date, and not being life assurance business as hereinbefore defined," but as from the date when The Industrial Assurance Act, 1923, came into operation (1st January, 1924) this definition is amended in two respects: (a) by substituting "six months" for "two months or less," and by adding after the word "defined" the words "or sinking fund or capital redemption insurance business" (Industrial Assurance Act, 1923, Section 42, Sub-section (1)). By Sub-section (2) of the same Section it is provided that where in return for subscriptions payable at periodical intervals of less than six months a person or body of persons corporate or unincorporate (not being registered or certified under the Acts relating to friendly societies, building societies, or trade unions) undertake, by prospectus or otherwise, to pay to a subscriber at a future date the amount of the subscriptions with interest thereon (with or without a right on the part of the subscriber to the return of his subscriptions in the meantime), such business shall, for the purposes of The Assurance Companies Act, 1909, be treated as bond investment business. By Section 34, Sub-section (a), of The Assurance Companies Act, 1909, it is declared that in the case of bond investment business "the expression 'policy' includes any bond, certificate, receipt, or other instrument evidencing the contract with the company, and the expression 'policy holder' means the person who for the time being is the legal holder of such instrument."

A bond investment company is exempted from complying with the provisions of the Act relating to deposits in cases where the company commenced to carry on business before the passing of the Act (Section 34, Sub-section (b)), and as soon as the bond investment fund amounts to £40,000, if the company has made a deposit in respect of any other class of assurance business, it may claim a return of the money deposited in respect of its bond investment business so long as the sum deposited in respect of any other class of business is kept so deposited (Section 34, Sub-section (c)).

¹ A class of companies sprang up some years ago which agreed in consideration of a payment of 5s. a month for ten years to pay the assured £50 at the end of that period. This form of assurance became very popular for a time, but was actually unsound, and was condemned by a committee appointed by the Board of Trade to inquire into the matter.

Section 34, Sub-section (e), provides that the company shall not give the holder of any policy issued after the passing of the Act "any advantage dependent on lot or chance,"¹ and this provision is to be "without prejudicing any question as to the application to any such transaction, whether in respect of a policy issued before or after the passing of the Act, of the law relating to lotteries."

6. INDUSTRIAL ASSURANCE COMPANIES.

The Assurance Companies Act contains further provisions in regard to unregistered trade unions, friendly societies, collecting societies, and industrial assurance companies, as well as provisions regarding insurance business by underwriters who are members of Lloyds, and others. Industrial assurance is now governed by The Industrial Assurance Act, 1923. Subject to certain exceptions, "industrial assurance business" is defined by Section 1, Sub-section (2), as meaning "the business of effecting assurances on human life premiums in respect of which are received by means of collectors." By Section 1, Sub-section (1), industrial insurance business cannot be carried on except by a registered friendly society or by an assurance company within the meaning of The Assurance Companies Act, 1909, which is either registered under the Companies Acts or The Industrial and Provident Societies Acts, 1893 to 1913, or incorporated by special Act. By Section 7, Sub-section (1), and Section 12, Sub-section (1), a deposit of £20,000 must be made. There are provisions in favour of those whose policies are forfeited for default in paying any premiums (Sections 23 and 24), and for the protection of a policy holder where the policy is illegal or not within the legal powers of the society or company (Section 5, Sub-section (1)), or where the proposal form is filled in wholly or partly by a person employed by the society or company and contains a misstatement, not being a fraudulent statement in some material particular made by the proposer (Section 20, Sub-section (4)), also as to accounts, returns, inspection, valuation, and meetings (Sections 15 to 19), and as to amalgamations, transfers, and conversions (Sections 36 to 38). Rules have been made for the purposes of this Act, and will be found in W. N., [1923] (November 24th), page 328. Further reference to this subject is not considered to be within the scope of this book.

¹ It was not uncommon for bond investment companies, before the passing of this Act, to provide for drawings to take place, under which the successful policy holder received payment of all or part of his bond before the expiration of the period of maturity of the bond.

7. RE-INSURANCE COMPANIES.

It has recently become common for companies to be registered for the purpose of re-insuring a portion of the risks underwritten by other companies, and often a very large business is done in this way. The contracts of re-insurance almost inevitably constitute policies and the business falls within the definition of the various classes of risks which are re-insured, *e.g.* a re-insurance of a fire risk is "the undertaking of liability against loss by or incidental to fire," and accordingly a re-insurance company must make deposits to the same extent as if it undertook on its own account the issue of policies of assurance of the class which it re-insures.¹

¹ Attorney-General *v.* Forsikrings-Aktieselskabet National, of Copenhagen, [1924]
1 K. B. 366.

CHAPTER V.

BANKING COMPANIES.

BANKS are the subject of certain special provisions. Of existing banking companies some are formed under Charters or Special Acts; some, formed before 1844, were incorporated by special Charter under The Joint Stock Banks Act, 1844; some are registered under the last-named Act; and some are registered under the Joint Stock Companies Acts or The Companies Act, 1862. There is also a certain number of private banks which are merely partnerships.

Under Section 4 of The Companies Act, 1862, and Section 1 of The Companies (Consolidation) Act, 1908, no company, association, or partnership consisting of more than ten persons might or may be formed for the purpose of carrying on the business of banking unless registered under those Acts or formed in pursuance of some other Act of Parliament or of Letters Patent.

Every limited banking company must before it commences business, and on the first Monday in February and the first Tuesday in August in every year, make a statement in the form¹ marked "C" in the First Schedule to The Companies (Consolidation) Act, 1908, or as near thereto as circumstances will admit, and put it up in a conspicuous place in its registered office and in every branch or place where its business is carried on. Every member and creditor of the company is entitled to a copy of this statement on payment of sixpence (Section 108).

The investigation by inspectors appointed by the Board of Trade (see page 419, *infra*) can in the case of a banking company be applied for only by members holding not less than one third of the share capital, instead of, as in the case of other companies, by holders of one tenth (Section 109).

The provisions in regard to audit which before 1900 applied only to banks have since that year applied to all companies; but in the case of banks registered since the 15th August, 1879, if the company has branches outside Europe it is sufficient if the auditor has access to such copies and extracts from the branch books as have been transmitted to the head office, and the balance sheet must be signed by the secretary or manager (if any) and by at least three directors if there are so many (Section 113).

Only banks which before the 6th May, 1844, were issuing bank notes can make or issue such notes in the United Kingdom, and

¹ The form contains particulars of capital, calls made and paid, and liabilities and assets.

it is provided in Part VII. of the Act (which relates to the registration of existing companies) that a "bank of issue registered under this Act as a limited company shall not be entitled to limited liability in respect of its notes; and the members thereof shall be liable in respect of its notes in the same manner as if it had been registered as unlimited," and if general assets are applied in paying note-holders the members must make good the amount so used (Section 251). Having regard to the position of this section in the Act—*i.e.* in Part VII.—it is suggested that it does not apply to a company formed under the Act issuing bank notes outside the United Kingdom.

The Bank of England is now the only bank of issue in England and Wales, the last country bank of issue having transferred its undertaking in October, 1921, to a bank not having powers of issue. By Section 256, where a banking company which was in existence on the 7th August, 1862, proposes to register as a limited company, it must, at least thirty days before so registering, give notice of its intention to every person who has a banking account with the company, either by delivery of the notice to him, or by posting it to him at, or delivering it at, his last known address; otherwise the certificate of registration with limited liability shall have no operation as against the person to whom notice ought to have been given, so far as respects the account down to the time at which notice is actually given.

Banks governed by the Companies Acts which make the returns required by Section 26 of The Companies (Consolidation) Act, 1908 (see page 446, *infra*), together with a statement of the several places where they carry on business, are exempted from the obligation to make yearly returns to the Commissioners of Inland Revenue under The Bank Charter Act, 1844 (Section 21).

By The Banking Companies' Shares Act, 1867, commonly known as Leeman's Act, every contract for the sale or transfer of any share or stock of a joint stock bank in the United Kingdom is void unless it identifies the share or stock by its distinctive number, or, if there is no distinguishing number, by the name of the registered proprietor. This enactment is ignored by the custom of the Stock Exchange, but the custom is not binding on a vendor or purchaser of bank shares unless he can be shown to know of its existence.¹

The Moneylenders Act, 1900, applies to companies (see Section 2, Sub-section 2), but by Section 6, defining the expression

¹ *Neilson v. James*, [1882] 9 Q. B. D. 546; *Soymour v. Bridges*, [1885] 11 Q. B. D. 400; *Perry v. Barnett*, [1885] 15 Q. B. D. 388; *Loring v. Davis*, [1886] 32 Ch. D. 625.

“moneylender,” there is an exception in respect of “any person *bond fide* carrying on the business of banking or insurance or *bond fide* carrying on any business not having as its primary object the lending of money in the course of which and for the purposes whereof he lends money.”

By The Moneylenders Act. 1911, Section 2, it is enacted that “no person shall be registered as a moneylender under any name including the word ‘Bank’ or under any name implying that he carries on banking business,” and there is a further provision making penal the issue by a moneylender of circulars or notices stating or implying that he carries on banking business. These provisions were the result of the disclosures made in connection with the failure of the Charing Cross Bank, which was merely a money-lending concern.

CHAPTER VI.

COMPANIES NOT LIMITED BY SHARES.

COMPANIES LIMITED BY GUARANTEE.

COMPANIES LIMITED BY GUARANTEE are usually formed for the purpose of carrying on business as mutual insurance and trade protection societies, social, athletic, and other clubs, and concerns in which it is not intended to make a profit.

The principle on which these companies are constituted is that each person who becomes a member "undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and of the costs, charges, and expenses of winding up, and for adjustment of the rights of the contributories among themselves, such amount as may be required, not exceeding a specified amount" (Section 4). This amount has to be stated in the fifth clause of the Memorandum of Association, and may be any sum the subscribers to that document think fit—one pound or a thousand pounds, or any other sum, large or small.¹ The amount is not part of the capital of the company, and cannot be mortgaged or charged by debentures.²

In the form which is usually adopted the amount of the guarantee of each member remains the same, whatever his pecuniary interest in the company may be, and (beyond that interest) is the utmost extent to which he can be a loser in the event of the company going into liquidation.

The guarantee, moreover, is only so much per member, and accordingly, if the number of members is reduced, the amount of guarantee is also reduced, and the security of the creditor lessened to that extent, unless the Memorandum provides for membership continuing until some other person takes the place of the member then on the Register.

There are two kinds of Guarantee Companies provided for in the Act—viz., Companies Limited by Guarantee and Not Having a Share Capital, and Companies Limited by Guarantee and Having a Share Capital (Schedule III., Forms B and C).

¹ In the case of the Premier Underwriting Association (1912, not reported on this point) the guarantee was £5 for every policy of insurance issued, which was held to mean for every policy issued by the company, and not for every policy in which the member was interested, and calls of £2000 per member were accordingly made.

² *Re Pyie Works, Limited*, [1890] 44 Ch. D. at page 574, 584; *re Irish Club*, [1906] W. N. 127.

There is now practically no advantage attending the registration of Guarantee Companies with a share capital, as Section 4 prescribes that the Memorandum must state the amount of the share capital, which is therefore only subject to increase or reduction in the manner specified in the Act. The members of such a company would therefore have their liability increased by the amount of their guarantee, but would not be able to reduce the capital without the consent of the Court.

Section 21, Sub-section 1, also prescribes that, in the case of a Company Limited by Guarantee and not having a share capital, registered on or after the 1st January, 1901, every provision purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member shall be void; and Sub-section 2 provides that every provision in the Memorandum or Articles or in any resolution of any such company "purporting to divide the undertaking of the company into shares or interests shall be treated as a provision for a share capital, notwithstanding that the nominal amount or number of the shares or interests is not specified thereby."

This constitution is, however, sometimes adopted by insurance companies with the object that the policy holders shall be members with only a small liability, but that the company shall have a substantial capital subscribed by a limited number of persons to give solidity to its business. There is a provision in Section 123, Sub-section 1 (vi.), saving the power to make policies of insurance or other contracts in such form that the funds of the company are alone liable and the liability of the individual members is restricted.

In the case of Companies Not Having a Share Capital registered before the 1st April, 1909, and in the case of all Companies Limited by Guarantee registered before the 1st January, 1901, the Memorandum of Association has only four clauses, of which the first three are the same as those that are required for a Company Limited by Shares (see pages 6, and 11 to 20, *supra*), and the fourth is a declaration as to the amount to be contributed by each member of the company in the event of a winding up in accordance with the provisions of Section 4 set out on page 73, *supra*.

But in the case of Companies Limited by Guarantee and Having a Share Capital registered since 1900 a clause must be added stating the capital, and by Section 10, Sub-section 3, the capital of such a company must also be stated in the Articles of Association. The Declaration of Association in the Memorandum of Association of a Company Limited by Guarantee and Having a Share Capital (see page 33, *supra*) now contains the words "and we

respectively agree to take the number of shares in the capital of the company set opposite our respective names." No corresponding declaration is now contained at the end of the Articles of Association (see Schedule III., Form C).

In all Companies Limited by Guarantee Articles of Association "shall" accompany the Memorandum of Association (Section 10), and "must be printed" (Section 12). A form of Articles of Association for each kind of company, to serve as a model or to be adopted as it stands, is given in the Third Schedule to the Act.

In the case of a Guarantee Company Not Having a Share Capital "the Articles must state the number of members with which the company proposes to be registered, for the purpose of enabling the Registrar to determine the fees payable on registration" (Section 10). When the number of members is increased beyond that authorised by the original Articles notice of the fact has to be filed with the Registrar on the prescribed form, impressed with the appropriate stamp (see Table B in the First Schedule). Such a company, if registered before the 1st January, 1901, may (although not having a share capital) divide its "undertaking" into "shares or interests," and provide for the transmission of such shares in a manner analogous to shares of capital¹; but in the case of a company registered since that date "every provision . . . purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member shall be void" (Section 21, Sub-section 1).

The words "otherwise than as a member" are important, but the Registrar of Companies nevertheless, in accordance with directions given by the Board of Trade, declines to accept the papers of a company intended to be limited by guarantee and not having a share capital whenever it is apparent, either from the Memorandum or the Articles or from the nature of the company, that it is intended that the members shall have distinct interests in either the profits or the capital of the company.

In the case of a Guarantee Company Having a Share Capital the Articles must state the amount of capital with which the company proposes to be registered. Where the company was registered before the 1st January, 1901, the capital being set out only in the *Articles* of Association, those Articles and consequently the capital, may, in pursuance of the powers, conferred by Section 13, be varied from time to time as the company thinks fit. This deserves particular notice, inasmuch as a company so constituted may manipulate its capital to any

¹ *Malleison v. General Mineral Patents Syndicate*, [1894] 3 Ch. 538.

extent, either by increasing or reducing it, or by cancelling shares, without being under the necessity of obtaining any other sanction than that of the members in general meeting.¹ This freedom with respect to capital is, it will be observed, very different from the restrictions imposed upon Companies Limited by Shares; but it does not apply to Guarantee Companies registered since 1900.

Where a company was formed to purchase a property and re-sell it in lots it was of great advantage to be able to return the capital without going to the Court, and for such a purpose this form of limitation by guarantee was very valuable; but that advantage is lost now that the capital must be stated in the Memorandum of Association.

Companies Limited by Guarantee and Having a Share Capital have to pay *ad valorem* duty on their nominal capital before they can be registered, in the same manner as Companies Limited by Shares.

When a Company Limited by Guarantee and Having a Share Capital goes into liquidation every member of the company is liable to contribute to the extent of the amount unpaid on any shares held by him in addition to the amount he has undertaken specially to contribute (Section 123, Sub-section 3). This is a variation of Section 38 of the Act of 1862. Under that Act it was held that the member might be sued for amounts payable under provisions of the Articles, but could not be entered in the list of contributories for such sums.²

The liability of past members is limited in the same manner as in the case of members of Companies Limited by Shares (see page 20, *supra*), and calls cannot be made on them unless present members are unable to pay calls sufficient to satisfy the debts of the company.³ The amount of the guarantee is in the nature of reserve capital, and cannot be mortgaged or charged before liquidation, but remains available for paying the costs of winding up and the general liabilities of the company.⁴

The books required to be kept and the returns to be made by Guarantee Companies Having a Share Capital are the same as are required from Companies Limited by Shares (Sections 26 and 75; see Book II., Chapter VII., page 446, *infra*), except that Returns of Allotments of Shares are not required.

The returns required to be made by a Guarantee Company Not Having a Share Capital are the Notice of the Situation of

¹ See *re* Borough Commercial and Building Society, [1893] 2 Ch. 242: the case of an Unlimited Company.

² *Baird's Case*, [1890] 2 Ch. 593.

³ *Prenner Underwriting Association No. 1*, [1913] 2 Ch. 29.

⁴ *Re Pyle Works, Limited*, [1890] 44 Ch. D. 574, 584; *re* Irish Club Co., [1906] W. N. 127.

its Registered Office or any change therein (Section 62), a copy of every Special or Extraordinary Resolution (Section 70), and Particulars respecting its Directors or Managers and of any change therein that may take place from time to time (Section 75 and The Companies (Particulars as to Directors) Act, 1917). It must also give notice of any Increase in the Number of its Members (Section 44).

The provisions of Section 65 as to the holding of a statutory meeting do not apply to Companies Limited by Guarantee, and the only provision affecting the first meeting is that a general meeting must be held once at least in every year, not more than fifteen months after the last preceding general meeting (Section 64). The provisions as to the holding of annual general meetings and extraordinary meetings are the same for all companies (Sections 64 and 66).

ASSOCIATIONS NOT FOR PROFIT.

Under Section 20, if it is proved to the satisfaction of the Board of Trade that any association about to be formed "for promoting Commerce, Art, Science, Religion, Charity, or any other useful object," where the intention is to apply its profits or income solely in promoting its objects, and to prohibit the payment of any dividend to its members,¹ the Board may by Licence direct that it be registered with limited liability, without the addition of the word "Limited" to its name.

The Board of Trade has power to impose conditions and make regulations, and the course which has to be adopted in practice is as follows:—Application has to be made to the Board for its Licence, and two copies of the proposed Memorandum and Articles of Association, printed on foolscap paper, submitted for settlement by the counsel of the Board. A cheque for seven pounds twelve shillings must also accompany the documents to pay counsel's fee, together with the names of the promoters of the association, and, if it is an existing but unregistered association, the names of the present council, committee, or other governing body. The Board may also require, before proceeding with the application, to be furnished with any other information it may deem necessary to justify the granting of a Licence.

When settled by counsel, one copy of the documents will be returned for such amendments as may be required, and the

¹ This provision and the form usually adopted by the Board of Trade prohibiting payments to members do not prohibit any payment made for value received, or for services rendered by a member, or the granting of a pension to a retiring officer who is a member (*Cyclists' Touring Club v. Hopkinson*, [1910] 1 Ch. 179).

application must then be advertised once at least in each of two successive weeks in some daily newspaper circulating in the neighbourhood of the proposed association. When the Board's requirements are satisfied, provided no objections to the registration have been sent in, the Board's Licence will be issued, which must then, with the Memorandum and Articles, List of Directors, Consent to Act as Directors, Statement in Lieu of Prospectus, Notice of the Situation of the Registered Office, Particulars respecting Directors, and a Declaration of Compliance with the Requirements of the Act, be deposited with the Registrar. The fee payable on the Memorandum will depend on the number of members of which the association is declared to consist (see Table of Fees in Appendix B), and a ten-shilling deed stamp will be required on both the Memorandum and Articles, and a fee stamp of five shillings each on the Articles and other documents.

Before operations are commenced the Registrar's Certificate entitling the association to carry on business must be obtained; this Certificate will be issued on the filing of a Declaration of Compliance with Section 87 (Form 44A), although such a declaration is quite inappropriate.

Should such an association desire to alter its Memorandum of Association the proper course is to submit the proposed alterations to the Board of Trade first, and if the Board approves them to apply to the Court under Section 9.¹ Similarly, any proposed modification of the Articles should be submitted to the Board and its approval obtained before the passing of the requisite special resolution. The Registrar declines to accept special resolutions altering Articles unless they have been approved by the Board. Where the proposed alterations are extensive the Board requires the resolution to be settled by its counsel and his fee of seven pounds twelve shillings paid.

Associations of this nature have the same privileges and are subject to the same obligations as other Limited Companies, with the exceptions that no such association is required to use the word "limited" as part of its name, to publish its name, or to make the Returns of Directors or Managers and of Members required from other companies (Section 20, Sub-section 3); but Particulars respecting the Directors must be filed within a month of the incorporation of the association.

By Section 20, Sub-section 4, the Board of Trade may give notice to any such association of its intention to revoke the Licence granted under the section, and, after giving the association an opportunity of being heard in opposition, may revoke the Licence,

¹ *Re St. Hilda's Incorporated College, Cheltenham*, [1901] 1 Ch. 556.

and upon such revocation the Registrar must enter the word "Limited" at the end of the association's name in his Register, and the association will thereupon cease to enjoy the exemptions and privileges granted by the section.

"A company formed for the purpose of promoting Art, Science, Religion, Charity, or any other like object, not involving the acquisition of gain," may not hold more than two acres of land without the sanction of the Board of Trade (Section 19). From these words it seems that a company which is formed in the manner above described for the purpose of promoting Commerce is not restricted as to the holding of land.

It may be noted that Literary and Scientific Societies can be formed under The Literary and Scientific Institutions Act, 1854 (17 & 18 Vict., Ch. 112), which enables them to acquire land not exceeding an acre. By Section 30 of that Act the assets on the dissolution of such a society are not to be distributed among the members, but are to be applied to similar purposes. This section does not, however, apply to a society in the nature of a joint stock company.¹

UNLIMITED COMPANIES.

Very few companies are now registered with Unlimited Liability, and many banking and other companies originally constituted as Unlimited Companies have been re-registered with Limited Liability under the power conferred by The Companies Act, 1879, now re-enacted by Sections 57 and 58 of the Consolidation Act. The members of an Unlimited Company are liable to calls until the whole of the company's debts or obligations (however heavy they may be) are paid, but they can only be called upon *pro rata* according to their interest in the company, and their liability is altogether at an end one year after they have ceased to be members. In these two particulars Unlimited Companies have important advantages over private partnerships, and also over limited partnerships registered under The Limited Partnerships Act, 1907, so far as the "general partners" are concerned.

Unlimited Companies, like Companies Limited by Guarantee (see page 73, *supra*), may be registered either with or without a capital divided into shares. The Memorandum of Association must state—(1) The name of the proposed company; (2) The part of the United Kingdom (whether England or Scotland or Northern Ireland or the Irish Free State) in which the registered office of the company is to be situate; and (3) The objects for which the company is to be established (Section 5). It must be accompanied by printed Articles of Association (Section 12),

¹ Clegg v. Ellison, [1898] 2 Ch. 83; Bristol Athenæum, [1890] 43 Ch. D. 290.

which must state the number of members the company is to consist of, or the amount of the nominal capital, "for the purpose of enabling the Registrar to determine the fees payable on registration" (Section 10, Sub-sections 3 and 4). The capital, being stated in the Articles of Association, may be varied at any time by special resolution without the sanction of the Court, and, if the Articles allow it, capital may be returned to members, and they may cease to be members on such terms as may be agreed upon.¹ The duty of one pound per cent. on the capital of a Limited Company is not payable on the registration of an Unlimited Company.

So far as regards the powers of an Unlimited Company and of its directors, the conduct of its business and proceedings, the alteration of its Memorandum or Articles of Association, and its winding up, the same considerations apply as in the case of a Limited Company. The Returns required to be made by Unlimited Companies are the same as those by other companies.

UNLIMITED COMPANIES ACQUIRING LIMITED LIABILITY.

Under Section 57, a company already registered with Unlimited Liability may re-register as a Limited Company, and may by the resolution assenting to such re-registration increase its nominal capital by increasing the nominal amount of each of its shares. But no part of such increased capital shall be capable of being called up except in the event of and for the purposes of the company being wound up (Section 58 (a)). Even where there is no increase of nominal capital, the company registering may provide that a portion of its capital shall only be called up in case the company is being wound up (Section 58 (b)). The members of the company remain liable in respect of pre-existing debts to the same extent as before, but are protected with regard to subsequent liabilities. As to the liability of banks of issue for their notes see pages 70 and 71, *supra*. If an Unlimited Company seeking to limit its liability alters its Memorandum of Association and adopts the word "Limited" in its name, it must register as a Limited company before applying for sanction to the alterations.²

COMPANIES IN THE STANNARIES.

A company of more than twenty members may still be formed without registration under the Companies Acts if it be "engaged in working mines within the Stannaries and subject to the

¹ *Re Borough Commercial and Building Society*, [1893] 2 Ch. 242.

² *Royal Exchange Buildings, Glasgow*, [1911] S. C. 1337, Court of Sess.

jurisdiction of the Court exercising the Stannaries jurisdiction"¹ (Section 1). Such companies are frequently formed, in accordance with a somewhat curious local custom, on what is known as the "Cost Book System." This is a customary form of partnership for working mines within the Stannaries (*i.e.* Cornwall and Devon), according to which each partner is at liberty to transfer his shares, when all calls are paid,² without the consent of his co-partners. These companies are governed by The Stannaries Acts, 1869 and 1887. Any partner is at liberty to determine his liability at any time, not being within six weeks of a winding up,³ by relinquishing his shares.⁴ No fixed capital is necessary, money being called up as it is wanted. The affairs of the partnership are managed by an agent called "the purser," subject to the control of the partners in their periodical meetings. The purser and any one of the partners are agents for and can bind the whole body in respect of any contract relating to the carrying on of the mine, other than transactions in the way of borrowing money. The accounts are open to the inspection of the partners at the meetings, and the agreement into which the partners have entered, the receipts and expenditure of the mine, the names of the shareholders, their respective accounts with the mine, and the transfers of their shares, are entered in a book or books called the "Cost Book."⁵

The company, unless registered under the Companies Acts, is a mere partnership, and a member remains liable to creditors for all debts incurred while he is a member,⁶ unless he has ceased to be a member for two years before the mine has ceased to be worked or the company is wound up.⁷

The Stannaries Court (which was formerly presided over by the Vice-Warden of the Stannaries) was abolished in 1896, and its jurisdiction and powers transferred to and vested in the County Courts of Cornwall, which now have jurisdiction over mines and miners within the Stannaries, and for winding up companies⁸ formed for

¹ *I.e.* metalliferous mines and tin-streaming companies in Cornwall and Devon. There are china-clay companies formed in a similar manner which do not fall within the exception.

² Stannaries Act, 1869, Section 14.

³ Stannaries Act, 1887, Section 22.

⁴ See *ex parte Palmer*, [1872] 7 Ch. 280; *Frank Mills Mining Co.*, [1883] 23 Ch. D. 52.

⁵ The above statement of the nature of the Cost Book System is taken from Mr. John Batten's book on *The Stannaries Act, 1869*.

⁶ *Kittow v. Liskeard Union*, [1875] L. R. 10 Q. B. 7; *Chymouth's Case*, [1880] 15 Ch. D. 13.

⁷ Companies (Consolidation) Act, 1908, Section 209, Sub-section 1.

⁸ "Companies" for this purpose includes partnerships, even if only consisting of two persons, and the jurisdiction of the County Courts is exclusive, so that proceedings cannot be taken in the High Court (*Dunbar v. Harvey*, [1913] 2 Ch. 530).

working mines within the Stannaries and not shown to be working mines elsewhere, whatever the amount of capital and wherever the registered office may be (Section 131, Sub-section 4).

ILLEGAL PARTNERSHIPS AND ASSOCIATIONS.

Since 1862 it has been unlawful for any company, association, or partnership consisting of more than ten persons to be formed for the purpose of carrying on the business of Banking, or of more than twenty persons for carrying on any other business "that has for its object the acquisition of gain" by the company or by its individual members, unless registered under the Companies Acts, or formed under some other Act of Parliament, or under Letters Patent, unless it be a company engaged in working mines in the Stannaries (Act of 1862, Section 4; Act of 1908, Section 1).

It was decided by the Court of Appeal that Mutual Insurance Societies existed for "the acquisition of gain" within the meaning of the former Acts, and accordingly that if consisting of over twenty members they were illegal associations unless registered.¹ The same rule applies to Mutual Benefit Societies and Loan Societies, the Courts holding that an unregistered society could not recover the balance of a loan made to one of its members, on the ground that, the society being unregistered, "the loan to the defendant was made in pursuance of an illegal object, and the note sued on was given for an illegal consideration, and could not be sued upon, either by the society or by anyone suing as a trustee for the society."² The rule also applies where the members of the society were originally less than twenty, but have been increased to over that number.³ But such a society is beneficial owner of its property, and a servant embezzling its money is liable to conviction.⁴ Where persons calling themselves managers, who had adopted no constitution, received moneys for assuring sick benefits, and described the assured as "members of the One and All Association," it was held that no business was carried on by the association, and the managers were liable to account as trustees.⁵

Members of an unregistered society are in the unenviable position of being individually liable, at any rate in respect of any orders they may give or contracts they may make personally,

¹ Padstow Total Loss &c. Association, [1882] 20 Ch. D. 137.

² Jennings v. Hammond, [1882] 9 Q. B. D. 225, Shaw v. Benson, [1883] 11 Q. B. D. 563.

³ *Ex parte* Thomas, [1885] 14 Q. B. D. 379.

⁴ Reg. v. Tankard, [1891] 1 Q. B. 548.

⁵ One and All Sickness Association, [1909] 25 T. L. R. 674.

while neither personally as members nor collectively as a society have they any power of enforcing the payment of debts due to it. The importance of registration is therefore obvious.

Illegal associations cannot be wound up under the Act.¹

Trade Unions (see page 5, note 4, *supra*) may not register under the Acts, there being provisions for registration of such societies under The Trade Union Acts, 1871 to 1913. The Registrar of Companies declines to register any Memorandum of Association whose objects contain a clause capable of being construed as authorising the doing anything in restraint of trade or carrying on the business of a Trade Union in any way. Even if registered as a company the registration is void, and if the number of members exceeds twenty the company is an illegal association.²

¹ *Padstow Total Loss &c. Association*, [1882] 20 Ch. D. 137 *National Debenture and Assets Corporation*, [1891] 2 Ch. D. 505.

² *Edinburgh Aerated Waters Defence Association v. Jenkinson*, [1901] 5 F. 1150, Court of Sess.

CHAPTER VII.

THE BOOKS AND SEAL OF THE COMPANY.

THE MEMBERS OF A COMPANY.

MEMBERSHIP is defined by Section 24 of the Consolidation Act as follows:—"The subscribers of the Memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration shall be entered as members in its Register of Members. Every other person who agrees to become a member of a company, and whose name is entered in its Register of Members, shall be a member of the company."

A subscriber of the Memorandum is therefore a member whether he has otherwise agreed to become so or not, and whether or not his name is entered on the Register, and he is bound to take and pay for the number of shares written opposite his name,¹ although if he subsequently apply for and receive an allotment of an equal or greater number of shares this may be treated as a satisfaction of his obligation under the Memorandum.² The directors have no power to release a subscriber of the Memorandum from his obligation to take shares,³ and a subscriber can therefore escape only by taking up and transferring the shares. He will, however, be relieved from liability if the whole of the shares are allotted to other persons, so that no shares are left in respect of which he can be registered.⁴ When the liability is thus extinguished, it does not revive on an increase of capital or a forfeiture of shares putting further shares at the disposal of the directors.⁵

A person who does not subscribe the Memorandum does not become a member until his name is entered in its Register of Members (Section 24, *supra*). While a contract by such person to take shares is still *in fieri*, *i.e.* until he acquires the status of member by entry on the register, the contract can be rescinded by the mutual consent of the company and himself.⁶

¹ Tyddyn Sheffrey Slate Co., [1869] 20 L. T. 105, Drummond's Case, [1869] 4 Ch. 772; Pell's Case, [1870] 5 Ch. 11.

² Gilman's Case, [1886] 31 Ch. D. 420.

³ London Coal Co., [1877] 5 Ch. D. 525.

⁴ Tufnell's Case, [1885] 29 Ch. D. 421, Evans's Case, [1867] 2 Ch. 427; London Coal Co., [1877] 5 Ch. D. 525, Levick's Case, [1870] 40 L. J. Ch. 180, 23 L. T. 838.

⁵ Muckley's Case, [1876] 1 Ch. D. 247.

⁶ Nicol's Case, 20 Ch. D. at page 411, *per* Bowen, L. J.

The same considerations as to what is good payment (*e.g.* the set-off of a debt) apply to shares thus taken as to shares taken in the ordinary way. But while Section 25 of the Act of 1867 was in force they could only be protected from the liability to pay for their shares in cash by the registration of a contract.¹ Since the repeal of that section they can pay for shares for which they have subscribed the Memorandum by a transfer of property or by services in any manner agreed with the company; but shares allotted to a subscriber as fully paid out of the consideration payable to the vendors will not satisfy his liability,² nor where the consideration is payable to the vendors jointly and only one has subscribed the Memorandum can the latter treat the fully paid shares as being on account of his subscription.³

The other persons who are members are those who have agreed to take shares and whose names are entered in the Register. These persons are not members until their names are entered in the Register; but if there is a complete agreement between them and the company they will not escape liability, for the Register can be amended under Section 32 while the company is a going concern, or under Section 163 when the company is in liquidation.⁴ On the other hand, to have his name entered in the Register does not make a man a member if he never agreed to become one, for the name may in like manner be removed, and if retained in the Register after his name should have been removed the Court may make its order for removing his name retrospective, so as to free him from liability as a contributory.⁵

A corporation may be a member if authorised by its constitution to hold shares⁶; but a partnership should not be entered in the firm name, as the firm is not "a person," and the names of the individual holders of the shares must be entered in the Register (Section 25). If a transfer purports to be made to a firm in its firm name the company may reject it.⁷ If, however, the firm name is in fact entered with the consent of the partners, they become liable as members.⁸

¹ *Jarvis & Co., Limited*, [1899] 1 Ch. 103; *Ebenezer Tinnums & Sons*, [1902] 1 Ch. 238.

² *Migotti's Case*, [1867] 4 Eq. 238; *Drummond's Case*, [1869] 4 Ch. at page 778; *Forbes and Judd's Case*, [1873] 8 Ch. 270.

³ *Fothergill's Case*, [1873] 8 Ch. 270.

⁴ *Winstone's Case*, [1879] 12 Ch. D. 239; compare *Porter v. Kinnens*, [1877] 1 C. P. D. 201, 664.

⁵ *Nation's Case*, [1866] 3 Eq. 77; compare *Sussex Brick Co.*, [1904] 1 Ch. 598.

⁶ *Bath's Case*, [1878] 8 Ch. D. 334; *Barned's Banking Co., ex parte Contract Corporation*, [1867] 3 Ch. 105.

⁷ *Vagliano Anthracite Collieries*, [1910] W. N. 187.

⁸ *Weikersheim's Case*, [1873] 8 Ch. 831.

The simplest and most usual form of agreement to become a member is an application for and an allotment of shares. This is dealt with in Chapter IX. (page 171 *et seq.*, *infra*). But an agreement may be made in other ways. For instance, it may be part of the preliminary contract with the vendor that he shall take shares; persons may by underwriting letters bind themselves to take any shares not subscribed for by the public; or there may be contracts to take shares which are not in writing, for a man may agree with the company by word of mouth, or even by conduct, to become a member. "A formal agreement is not necessary. . . . If the substance of an agreement is made out the form is not material."¹ Thus, if a man who has not previously agreed to take shares knows that they have been allotted to him, and afterwards acts as a member of the company (for instance, by attending meetings, giving proxies, or selling or attempting to sell some of the shares), he will be held to have accepted the allotment and to be a member in respect of the shares. Or a person accepting the office of director when the Articles make it a condition of his office that he shall take shares from the company will be held to have agreed to become a member. (See "*Directors' Qualification Shares*," Book II., Chapter I., page 298, *infra*.)

A statement in the prospectus that directors or others have agreed to take shares will not alone be sufficient to render them liable.²

An agreement to take shares may be made through an agent.³ The authority of the agent must be considered under the ordinary doctrines of principal and agent. An application by a person not having authority of course does not make the supposed principal a member⁴; but it must be noted that the act of a person purporting to be an agent may be ratified by the intended principal, and such ratification may be by acquiescence if there is full knowledge of the facts⁵; and, further, that where a person has given a written authority, which is acted upon by a third party in good faith (*e.g.* by a company in making an allotment), he may be estopped from alleging that the authority was limited by private instructions, or was not complete, if upon the face of the document all was in order.⁶ As an authority coupled with an interest (*e.g.* given for valuable consideration) is irrevocable, an

¹ Per James, L. J., in *Ritso's Case*, [1876] 4 Ch. D. at page 782.

² *Moore Bros. & Co.*, [1899] 1 Ch. 627, *Todd v. Miller*, [1910] S.C. 869, Court of Sess.

³ *Levita's Case*, [1870] 5 Ch. 489; *Fraser's Case*, [1871] 24 L. T. 746; *Barrett's Case*, [1865] 4 De G. & Sm. 416.

⁴ *Ex parte White*, [1867] 16 L. T. 276; *Coventry's Case*, [1891] 1 Ch. 202.

⁵ Without knowledge of the facts there can be no ratification (*Banque Jacques Cartier v. Banque d'Epargne*, [1885] 10 App. Cas. 111).

⁶ *Re Henry Bentley & Co.*, [1893] 69 L. T. 204.

underwriting letter containing authority for some person to apply in the name of the underwriter, when duly accepted, cannot be revoked.¹

A person who purports to contract as agent for another, not having authority, does not himself become a member, but is liable to the company in damages for breach of warranty of his authority—the measure of damages being the loss sustained by the company, which may in some cases be the whole nominal amount of the shares.²

There is no contract in a case where an agent by mistake applies in the name of his principal for shares in the wrong company,³ or where, by the fraud of a company or its agent, the applicant is led to believe he is contracting with a different company from that to which his application is addressed.⁴

To accept a transfer of shares involves an agreement to become a member, and, if the shares are not fully paid, renders the transferee liable for the unpaid balance. A mortgagee of shares, therefore, should not take a transfer into his own name unless the shares are fully paid: if he does so he is liable for any calls made.⁵

If an agreement to take shares (not arising merely by subscribing the Memorandum) is brought about by misrepresentation, made either by the company or its agents, the member can, before a winding up, obtain rescission of the contract, repayment of what he has paid, and removal of his name from the Register. But, a contract procured by misrepresentation being only voidable and not void, if the company has gone into liquidation and other interests have come into existence, it is too late to set the contract aside, and the person remains a member. (See under head of "EFFECT OF MISREPRESENTATION IN THE PROSPECTUS," page 137, *infra*.) If, however, there was in fact no contract to take shares, the supposed member can at any time have his name removed from the Register, for he was never really a member.⁶

A man ceases to be a member of a company upon a complete transfer of his shares being made; but he remains liable to a limited extent in the event of a liquidation occurring within one year after the transfer. On the death of a shareholder the membership of course ceases, but his estate remains entitled to

¹ *Charnichael's Case*, [1806] 2 Ch. 643; *Hindley's Case*, [1806] 2 Ch. 121; *Olympic Reinsurance Co.*, [1920] 2 Ch. 341.

² *Ex parte Panmure*, [1883] 24 Ch. D. 367, *Coventry's Case*, [1891] 1 Ch. 202.

³ *Ex parte Panmure*, [1883] 24 Ch. D. 367.

⁴ *Re International Society of Auctioneers*, [1898] 1 Ch. 110.

⁵ *Weikersheim's Case*, [1873] 8 Ch. 831.

⁶ *Oakes v. Turquand*, [1867] L. R. 2 H. L. 325; *Alabaster's Case*, [1869] 7 Eq. 273.

the benefits and subject to the burdens arising from his membership until some other person is entered in the Register in respect of his shares. His executor or administrator, however, does not become a member unless he consents to be treated as such and to be entered in the Register.¹ A man may also cease to be a member by a surrender or forfeiture of his shares properly made; and in the case of Unlimited Companies the Articles may provide for a person ceasing to be a member in any manner which may be agreed, for in such cases the company has power to reduce its capital without reference to the Court.² Thus, in the case of Mutual Ship Insurance Companies it is often provided that a person is a member only so long as he has ships insured in the company. It would seem, however, that in a company limited by shares, and in a company limited by guarantee and having a share capital formed since 1900, a person cannot cease to be a member in any manner which would reduce the capital of the company other than in the ways above referred to. Therefore, as a company cannot purchase its own shares, a transfer purporting to be made to the company will not relieve the transferor from liability.³

The representatives of a deceased or bankrupt member are entitled to receive on behalf of the estate any dividends, bonuses, or benefits attaching to the shares, and are liable to contribute in respect of the estate in their hands and to be put on the list as representative contributories (see Section 126), but are not themselves members unless they take the shares into their own names.⁴ Until they do this, however, they are not entitled to receive notices from the company,⁵ unless the Articles expressly so direct.

The company cannot refuse to enter executors in the Register or insist on inserting a notice that they hold in a representative capacity unless the Articles contain some authority to do so, and must enter the names in the order desired by the executors—a matter which often affects the right to vote and receive notices⁶; moreover if joint holders of a block of shares so require, the company must enter in its Register some of the shares in the names in such order that one comes first and other of the shares in the names in such order that another comes first.⁷

¹ *Bowling and Welby's Contract*, [1895] 1 Ch. 670. The executor can insist on being entered as a member in his own right (*T. H. Saunders & Co.*, [1908] 1 Ch. 415).

² See *re Borough Commercial and Building Society*, [1893] 2 Ch. 212.

³ *Trevor v Whitworth*, [1888] 12 App. Ca. 409.

⁴ *James v. Buena Ventura Syndicate*, [1896] 1 Ch. 456; *New Zealand Gold Extraction Co. v. Peacock*, [1894] 1 Q. B. 622, compare *Bowling and Welby's Contract*, [1895] 1 Ch. 663.

⁵ *Allen v. Gold Reefs of West Africa*, [1900] 1 Ch. 656.

⁶ *T. H. Saunders & Co.*, [1908] 1 Ch. 415.

⁷ *Burns v. Siemens Brothers Dynamo Works*, [1919] 1 Ch. 225.

Infant Members.

An infant may become a member of a company¹ and hold shares either by subscribing the Memorandum of Association² or by taking a transfer of shares,³ but the company has power to refuse to accept a minor as a shareholder or transferee of shares,⁴ and should always do so in any case where a liability attaches to the shares, for the infant can on attaining his majority repudiate the shares if they are then burdensome.⁵

The company or its liquidator can set the transfer aside on learning that the transferee is an infant,⁶ unless it has allowed him to transfer his shares and accepted his transferee,⁷ or has retained him on the Register or list of contributories after knowing of his infancy.⁸ If a transfer to an infant is repudiated either by the infant or the company, the person who transferred the shares to the infant is restored to the Register of Members or list of contributories as the holder of the shares,⁹ and it is immaterial that the transferor was ignorant of the infancy of the transferee¹⁰; and even if the infant has transferred some of the shares, the transferor to the infant remains liable in respect of the balance untransferred¹¹; but the transferor will escape liability if neither the infant on attaining twenty-one nor the company has repudiated the transfer of the shares to the infant, so that the infant has become a duly constituted member.¹² Nor can such transferor be put on the B List of contributories if his transfer was more than a year before the winding up, and the infant has re-transferred the shares to another person, even though the latter cannot pay the calls.⁷ If a purchaser who has not taken the shares into his own name procures the transfer to be made into the name of

¹ An infant cannot, however, become a member of a statutory corporation where the provisions of the Statute are such as to contemplate the acts of an adult. *e.g.* where every member is eligible for the council (*Seymour v. Royal Naval College*, [1910] 1 Ch. 800).

² *Re Laxon & Co.*, [1892] 3 Ch. 555; *Nassau Phosphate Co.*, [1876] 2 Ch. 610.

³ *Lunsden's Case*, [1868] 4 Ch. 31.

⁴ *Symon's Case*, [1870] 5 Ch. 298; *Castello's Case*, [1869] 8 Eq. 504.

⁵ *Dublin and Wicklow Railway Co. v. Black*, [1852] 8 Ex. 181; *Ebbett's Case*, [1870] 5 Ch. 302; *re Laxon & Co.*, No. 2, [1892] 3 Ch. 555.

⁶ *Symon's Case*, [1870] 5 Ch. 298; *Castello's Case*, [1869] 8 Eq. 504; *Massey & Griffin's Case*, [1907] 1 Ch. 582.

⁷ *Gooch's Case*, [1872] 8 Ch. 266.

⁸ *Parson's Case*, [1869] 8 Eq. 656 (three years); *Massey & Griffin's Case*, [1907] 1 Ch. 582 (nine years).

⁹ *Capper's Case*, [1868] 3 Ch. 458; *Symon's Case*, [1870] 5 Ch. 298; *Weston's Case*, [1870] 5 Ch. 614; *Castello's Case*, [1869] 8 Eq. 504.

¹⁰ *Litchfield's Case*, [1840] 3 D. G. & Sm. 141; *Reid's Case*, [1858] 24 Beav. 318; *Capper's Case*, [1868] 3 Ch. 458; *Mann's Case*, [1868] 3 Ch. 459, note; *Delmar's Case*, [1868] 38 L. J. Ch. 85.

¹¹ *Mann's Case*, [1867] 3 Ch. 459, note; *Curtis's Case*, [1868] 6 Eq. 455.

¹² *Parson's Case*, [1869] 8 Eq. 656; *Lunsden's Case*, [1868] 4 Ch. 31; *Ebbett's Case*, [1870] 5 Ch. 302; *Mitchell's Case*, [1869] 9 Eq. 303; *Massey & Griffin's Case*, [1907] 1 Ch. 582.



an infant, so that the transferor remains liable, the purchaser will be bound to indemnify the transferor, even where the infant is beneficial owner of the shares.¹

A person who has purchased shares and procured them to be transferred into the name of an infant cannot be put on the Register as the true owner of the shares² unless there can be shown to be some contractual relation between him and the company, or the circumstances are such as to show that the infant's name was used as a mere alias for the adult.³

If the infant repudiates his shares before or on attaining his majority he cannot merely on the ground of infancy recover any sums he has paid the company in respect of them⁴; and he cannot, even while an infant, retain the shares without accepting the burdens attaching to them, *e.g.* the liability for calls.⁵ Until he repudiates the shares he is, for the purpose of both benefits and burdens, a member and shareholder.⁶

Before The Infants' Relief Act, 1870, it was held that an infant could on attaining his majority accept the shares either by a definite act or by acquiescence,⁷ but upon the occurrence of a winding up the status of the member becomes fixed, and cannot be altered without the consent of the liquidator.⁸

The infant's repudiation may be at any time during his minority or within a reasonable time after attaining his majority, if he has not in the meantime accepted the shares. What is a reasonable time for repudiation varies with the circumstances. In a case of a settlement a lady who had received no benefits under it was allowed to repudiate after thirty-seven years⁹; but the receipt of benefits would determine the right of repudiation. In the case of shares in a company one¹⁰ or two years¹¹ delay has sufficed to put an end to the right; but in another case nearly three years' delay was held not to preclude relief.¹² If there is no repudiation within a reasonable time, the infant, as above stated,

¹ *Mantland's Case*, [1868] 38 L. J. Ch. 554; *Edwards' Case*, [1869] W. N. 211.

² *Mussey & Griffin's Case*, [1907] 1 Ch. 582; *King's Case*, [1872] 8 Ch. 206.

³ *Pugh & Sharman's Case*, [1872] 13 Eq. 506; *Richardson's Case*, [1875] 19 Eq. 588; *Nickalls v. Furneaux*, [1869] W. N. 118.

⁴ *Steinberg v. Scala* (Leeds), [1823] 2 Ch. 452, overruling *Hamilton v. Vaughan Sherrin Co.*, [1804] 3 Ch. 589. In this respect an infant is in the same position as an adult.

⁵ *Cork and Bandon Railway Co. v. Cazenove*, [1847] 10 Q. B. 935; *Leeds and Thirsk Railway Co.*, [1849] 4 Ex. 26; *North-West Railway Co. v. McMichael*, [1850] 5 Ex. 114.

⁶ *Lumsden's Case*, [1868] 4 Ch. 31, *re Laxon & Co.*, [1862] 3 Ch. 555.

⁷ *Mitchell's Case*, [1869] 9 Eq. 363.

⁸ *Castello's Case*, [1869] 8 Eq. 504; *Symon's Case*, [1870] 5 Ch. 208.

⁹ *Farrington v. Forrester*, [1893] 2 Ch. 401.

¹⁰ *Ebbett's Case*, [1870] 5 Ch. 302.

¹¹ *Mitchell's Case*, [1870] 9 Eq. 363.

¹² *Hart's Case*, [1868] 6 Eq. 312.

remains a contributory or member, subject, however, to the liquidator's or company's right (if not precluded by the acquiescence or delay of the company or liquidator) to remove the infant's name and substitute that of the transferor.¹

The cases above cited on the question of the limitation of the right of the infant to repudiate were decided before The Infants' Relief Act, 1870, and there is no decision as yet showing whether that Act renders the restriction as to a reasonable time still effective.

Where a director procured an allotment to be made to his infant children, who were at the time of the winding up still minors, he was held liable to make good the loss caused to the company by its inability to enforce calls²; and where a father has applied in the name of an infant son the father has been put upon the list of contributories.³

There is no authority as to how far an infant member while on the Register of Members can act as a director or exercise rights of voting, signing requisitions, and giving proxies; but there seems no reason why, while remaining a member, he should not exercise those functions.

A minor may be a member of a Building Society or Industrial and Provident Society; but in the former case he cannot vote or hold office, and in the latter case his rights in those respects are usually restricted by the Rules.

THE REGISTER OF MEMBERS.

Every company is required to keep a Register of its Members in one or more books, and Section 25 of the Consolidation Act prescribes that the following particulars shall be entered therein:—

1. The names and addresses, and the occupations, if any, of the members, and in the case of a company having a share capital a statement of the shares held by each member, distinguishing each share by its number, and of the amount paid or agreed to be considered as paid on the shares of each member;
2. The date at which each person was entered in the Register as a member;
3. The date at which any person ceased to be a member.

¹ See above and *Massey & Griffin's Case*, [1907] 1 Ch. 582.

² *Cronver Co., ex parte Wilson*, [1873] 8 Ch. 45.

³ *Richardson's Case*, [1875] 19 Eq. 589, *Mauley's Case*, [1890] 2 Mcg. 71; *Reaveley's Case*, [1847] 1 D. G. & Sm. 530. But if the company know of the infancy and refuse to accept the infant, they cannot make the father a member (*Maxwell's Case*, [1858] 21 Beav. 321).

It is not uncommon for secretaries to enter in the Register, not the date when the name of a person was entered in the Register as a member, but the date when he agreed to become a member. This is not in accordance with the Act, and may be material. Except in the case of a subscriber to the Memorandum, a person is not a member until his name is entered in the Register, and the secretary must make a true record to show when he became a member.

In the case of joint holders it is their right to determine in what order their names shall be entered, a matter which will affect the right of attending at meetings and voting in cases where the Articles declare that only the first named shall have this right,¹ and it has been held that where two trustees held a large block of shares they might require to have their names entered as to some of such shares in one order, and as to other of such shares in the reverse order, and on the company failing to comply the Court rectified the register.²

The penalty for not keeping such a Register is five pounds per day, and every director or manager knowingly and wilfully permitting default is liable (Section 25, Sub-section (2)). The Register of Members is *prima facie* (but not conclusive) evidence of any matters directed or authorised to be inserted therein (Section 33).

By Section 27 it is provided that no notice of any trust shall be entered on the Register or be receivable by the Registrar in the case of English or Irish companies,³ and the company may not enter particulars of a lien it may claim to have on the shares.⁴ "It seems to me extremely important," said Lord Coleridge in the Court of Appeal, "not to throw any doubt on the principle that companies have nothing whatever to do with the relation between trustees and their *cestui que trust* in respect of the shares of the company."⁵ But the Court will intervene to protect equitable rights by injunction if application is made before the transfer is complete.⁶

The rule does not mean that the company, with knowledge of the rights of other people, can make advances to the registered holder on the security of the Shares, ignoring the rights of

¹ T. H. Saunders & Co., [1908] 1 Ch. 415.

² Burns v. Siemens Brothers Dynamo Works, [1919] 1 Ch. 225.

³ See *Société Générale v. Tramways Union*, [1885] 14 Q. B. D. 424, affirmed 1886, 11 App. Ca. 20; from which it appears that the company is not liable, although it is suggested the directors may be, for ignoring notices of trust. See also *Simpson v. Molson's Bank*, [1895] App. Ca. 270.

⁴ W. Key & Son, [1902] 1 Ch. 467.

⁵ *Re Perkins*, [1890] 24 Q. B. D. 613.

⁶ *Binney v. Ince Hall Coal Co.*, [1864] 35 L. J. Ch. 363. Such applications are of frequent occurrence.

which it has knowledge, for the company is not relieved from the obligation of giving effect to equitable rights of which it in fact has notice: *e.g.* its own lien will not take precedence of charges prior in date of which it has notice at the time of making the advance which gives rise to the lien.¹ Nor can it enforce its own lien against the holder upon Shares held by trustees if at the time of making the advance it knew that the shares were held in trust.² Where a company had notice of a transfer to trustees for creditors or others, it was held that it was justified in refusing to give effect to a subsequent transfer by the debtor to a purchaser for value.³ When a company upon receiving a transfer has notice of an adverse claim it usually gives notice to the claimant that it will register the transfer unless he takes proceedings within a specified time. But a company is not concerned to inquire whether trustees who are registered as shareholders are acting within their powers in dealing with the shares,⁴ and can enforce its own rights against the actual holders of shares irrespective of the rights of the persons for whom they are trustees.⁵ Nor does priority in giving notice to the company affect the priority of two charges one against another.⁶ If a person having equitable rights in shares desires protection he should serve a notice under Order XLVI., Rule 4, as explained at page 214, *infra*.

If an official of the company under a mistake strikes out the name of a member properly registered this is a nullity and must be disregarded, and if disputes arise as to the propriety of the act the Court will, on being satisfied that a mistake was made, order rectification of the Register so as to "restore and retain" the name of the person entitled to the shares.⁷

The Register of Members gives particulars of the shares as they were originally issued, with the changes from time to time made; the Register of Transfers (as its name implies) gives particulars of the changes which take place in the ownership of shares; and the Annual List and Summary shows the names, addresses, and occupations of the members in each year, and the aggregate number of shares held on the fourteenth day after the ordinary

¹ *Bradford Bank v. Henry Briggs*, [1886] 12 App. Ca. 29, *Rearden v. Provincial Bank of Ireland*, [1896] 1 Ir. R. 532 C. A.; *Bunney v. Ince Hall Coal Co.*, [1864] 35 L. J. Ch. 363.

² *Mackereth v. Wigan Coal and Iron Co.*, [1916] 2 Ch. 293.

³ *Pent v. Clayton*, [1906] 1 Ch. 659; *Roots v. Williamson*, [1888] 38 Ch. D. 485; *Moore v. North-Western Bank*, [1891] 2 Ch. 599.

⁴ *Simpson v. Molson's Bank*, [1895] App. Ca. 270.

⁵ *London and Brazilian Bank v. Brocklebank*, [1882] 21 Ch. D. 302. But it would seem that if the company had notice of the trust before the debt to itself was incurred the doctrine of *Bradford Bank v. Henry Briggs*, [1886] 12 App. Ca. 29, would apply, and the company would be postponed.

⁶ *Société Générale v. Walker*, [1880] 11 App. Ca. 20.

⁷ *Indo-China Steam Navigation Co.*, [1917] 2 Ch. 100.

general meeting, with other particulars, which will be found later on under the head "ANNUAL RETURNS OF CAPITAL AND MEMBERS" (page 446, *infra*). In the case of small companies these may all be bound together in one volume.

The Register of Members is not an easy book to keep in proper order, especially where there are different classes of shares, the calls of various amounts, and the transfers numerous. The Act does not prescribe any particular system of keeping the Register, but only requires that it shall contain the particulars above noted, and more than one book may be used.¹ Where, however (as is now usually the case), the capital is divided into one pound shares, to distinguish "*each share by its number*" would necessitate in many cases an exceedingly large book, or series of books, containing entries numbered consecutively from 1 to the full number of shares of which the capital consists (in some cases many thousands or even millions), and a correspondingly large amount of clerical labour.

A system of a combined Register of Members and Share Ledger is now commonly adopted, arranged so as to show the number of shares each member holds, the inclusive distinctive numbers of shares (*e.g.* 1 to 10, 11 to 60, and so on), and the amount called up and paid on the shares, with the other particulars prescribed by Section 25. When properly entered up, a Register of Members and Share Ledger arranged in that form shows at a glance the exact state of each member's share account. This system is recommended, being perhaps as comprehensive and simple as can be devised.

A company not entering in the Register the name of a person entitled to be put therein is liable to pay him damages for any loss he may have sustained by its neglect or refusal to do its duty (Section 32, Sub-section 2).²

Inspection and Copies of the Register.

The Register of Members, "commencing from the date of the registration of the company," must be kept at the company's registered office, and be open, for a period of at least two hours a day, to the inspection of any member gratis, and to the inspection of any other person on payment of a sum not exceeding one shilling for each inspection (Section 30). Any member or other person may demand to be supplied with a copy of the Register or of the Annual List and Summary, or any part thereof, on payment of sixpence for every hundred words required to be copied (Section 30, Sub-section 2), but is not entitled himself to take

¹ *Weikersheim's Case*, [1873] 8 Ch. 831, 836.

² See *Ottor Koppé Diamond Mines*, [1893] 1 Ch. 618; *Tomkinson v. Balkis Consolidated Co.*, [1891] 2 Q. B. 614.

extracts and make copies¹; although in the case of companies governed by The Companies Clauses Act, 1845, there is a right to take copies, for that Act gives no right to require copies to be supplied.² Any company refusing to supply such copy or to submit its Register for inspection is liable to a penalty of two pounds for the refusal, and a further penalty of two pounds for every day during which such refusal continues, and every director or manager is alike liable (Section 30, Sub-section 3). A person desiring to inspect cannot be required to give the reason for his desire,³ and even if it be known that the object of inspecting the Register or of requiring a copy thereof is antagonistic to the company, it is illegal to refuse such inspection or copy.⁴ But the right to inspect ceases upon the commencement of a winding up,⁵ and if inspection is required after liquidation an Order of Court must be obtained under Section 221.⁶ Such an Order entitles the party to inspect and take copies himself. He need not pay the liquidator a fee for having them made.⁷

Period when the Register may be Closed.

A company may close its Register for a period not exceeding thirty days in each year, upon giving notice thereof by advertisement in some newspaper circulating in the district in which the registered office is situate (Section 31). The usual course is to close the Register for fourteen days before the ordinary general meeting, and to state the fact in the notice convening the meeting. The main objects of closing the Register are that entries of transfer may be deferred until after dividends have been declared and paid, and that lists of members may be made out in the event of polls being demanded, and the like. But closing the Register is sometimes resorted to with the object of preventing hostile action, in which case the Courts will usually grant relief, as this is not a proper use of the power.

Rectification of the Register.

It is of the greatest importance that the Register of Members should be promptly and accurately entered up, as delay or inaccuracy frequently leads to expensive lawsuits. Section 32

¹ *Bulaghāt Gold Mining Co.*, [1901] 2 K. B. 665, overruling *Boord v. African Consolidated Land and Trading Co.*, [1898] 1 Ch. 506.

² *Mutter v. Eastern and Midlands Railway*, [1888] 38 Ch. D. 92.

³ *Holland v. Dickson*, [1888] 37 Ch. D. 669.

⁴ *Reg. v. Wilts and Berks Canal Navigation Co.*, [1873] 29 L. T. 922, 3 A. & E. 477; *Mutter v. Eastern and Midlands Railway*, [1888] 38 Ch. D. 92; *Davies v. Gas Light and Coke Co.*, [1900] 1 Ch. 708.

⁵ *Kent Coalfields Syndicate*, [1898] 1 Q. B. 754.

⁶ This section in terms applies only to a winding up by or under supervision, but in the case of a voluntary winding up Section 193 allows an order to be made under Section 221 (*per Chitty, L. J.*, in *Kent Coalfields Syndicate*, *supra*).

⁷ *Re Aramco Co.*, [1899] W. N. 131.

prescribes that if the name of any person is without sufficient cause entered in or omitted from the Register of Members of any company, or if default is made or unnecessary delay takes place in entering in the Register the fact of any person having ceased to be a member of the company, the person or member aggrieved, or any member of the company, or the company itself, may apply (in England or Ireland by motion in any of the Superior Courts or by application to a Judge in Chambers,¹ or in the Stannaries to the County Court Judge, and in Scotland by summary petition to the Court of Session) for an Order of the Court that the Register may be rectified; and the Court may "either refuse the application or order Rectification of the Register, and payment by the company of any damages sustained by any party aggrieved."² Such an Order must be notified to the Registrar of Companies (Sub-section 4). But if the Order for Rectification is refused, the Court cannot give damages upon a motion made under Section 32, the proper course being for the person aggrieved to bring an action.³ The Court has power to determine any question relating to the title of any party to the application (Sub-section 3). If no dispute arises as to the rights of the person who seeks to have his name entered in or removed from the Register, this section presents no difficulty. But as the inclusion or exclusion of a person's name in or from the Register determines his right to the benefit of the shares or his liability to pay calls upon them, a very large number of decisions have been given in cases arising under the similar section in the Act of 1862. Some of the principal results may be summarised here.

The Court will interfere and rectify the Register, upon a motion made under Section 32, where the error is due to the neglect or default of the company, and generally when the question arises between the company and a member or alleged member whether his name is properly included or excluded.⁴ The power of the Court is discretionary, and regard must be had to the "justice of the case."⁵ In a dispute between two individuals as to which

¹ In the Chancery Division the application is almost always by motion, and if made by summons would be referred into court. Some Judges require such motions to be entered in the list of non-witness actions. Unless there is a liquidation the Companies (Winding up) Division has no special jurisdiction to entertain such an application (British Columbian Gold Estates, [1899] W. N. 32). But any Judge, whether of the King's Bench or Chancery Division, has jurisdiction.

² As to the measure of damages see *Ottos Koppe Diamond Mines*, [1893] 1 Ch. 618.

³ See *Ottos Koppe Diamond Mines*, [1893] 1 Ch. 618.

⁴ *Ward and Henry's Case*, [1897] 2 Ch. 431; *Reese River Silver Mining Co. v. Smith*, [1870] L. R. 4 H. L. 64, 79.

⁵ Companies Act, 1862, Section 35, *Sichell's Case*, [1868] L. R. 3 Ch. at page 122; *re Dronfield Silkstone Co.*, [1881] 17 Ch. D. at page 97, *Trevor v. Whitworth*, [1888] 12 App. Ca., *per* Lord Macnaghten, at page 440. If the removal of a member's name was in consequence of an invalid surrender, it will be replaced even after seven years (*Bellerby v. Rowland and Marwood's Steamship Co.*, [1902] 2 Ch. 14).

ought to be registered as a member of the company, if the matter is a simple one the Court will decide it upon a motion under this section, and will make the necessary Order for Rectifying the Register. But if the question is complicated, or if the rights of third parties intervene, the Court will not interfere, but will allow the party aggrieved to seek his remedy by an action.¹

When a shareholder or transferee moves the Court the company is the proper respondent and the directors should not be made parties, and the directors even if they have done wrong cannot be made liable for costs,² unless added as defendants at their own request.³

In a proper case a company, being made a defendant in an action for (*inter alia*) rectification, can be ordered to give discovery of documents under Order 31, Rule 12, of the Rules of the Supreme Court. Thus where the plaintiff alleged that he had been induced, by the fraud of a director, to sell shares to him at an undervalue, and claimed as against the director that the transfer was void, and against the company that the register should be rectified, the company was ordered to disclose its balance sheets and the materials from which they were made up, for the period of ten years preceding the date of the agreement for sale of the shares.⁴

When the company has notice of a dispute it may itself apply to the Court for an Order under this section. Thus where a transfer was registered in fact, and an official of the company subsequently in error struck out the entry and restored the original holder who wrongfully claimed to be retained on the Register, the Court, on the application of the company, directed the Register to be rectified and ordered the objecting transferor to pay the costs of the company and the transferee.⁵

A member can by motion procure his name to be removed from the Register on the ground that he was induced to subscribe for his shares by fraud or misrepresentation in the prospectus,⁶ if the application is made within a reasonable time (as to which see pages 137 and 140, *infra*), and before proceedings have been taken to wind up the company.⁷ In an application of this nature the same general principles will apply as if the applicant were seeking

¹ Ward and Henry's Case, [1867] 2 Ch. 431; *ex parte* Shaw, [1877] 2 Q. B. D. 468, *ex parte* Sargent, [1874] 17 Eq. 273, Greater Britain Products Development Corporation, *re*, [1924] 40 T. L. R. 488.

² *Re* Keith Browne & Co, [1919] 1 Ch. 457.

³ Copal Varnish Co., [1917] 3 Ch. 349.

⁴ Cory v. Cory, [1923] 1 Ch. 90.

⁵ Indo-China Steam Navigation Co., [1917] 2 Ch. 100.

⁶ *Ex parte* Ward, [1867] L. R. 3 Ex. 180, *ex parte* Kintrea, [1870] 5 Ch. 95; London and Staffordshire Co., [1883] 21 Ch. D. 149.

⁷ *Muir re Glasgow Bank*, [1879] 4 App. Cas. 337, *Tennent v. Glasgow Bank*, [1879] 4 App. Cas. 615. See also page 130, *infra*.

rescission of any ordinary uncompleted contract on the ground of fraud or misrepresentation.¹ Where the shares are fully paid the Court may refuse to grant relief on motion, leaving the applicant to proceed by action.² A shareholder cannot retain his shares and ask for damages (see page 138, *infra*).

If there is in fact no contract, or the contract under which the alleged shareholder is supposed to have taken his shares is void from the beginning and not merely voidable, his name may be removed from the Register even after a winding up has commenced; for he never agreed to take the shares,³ and in such a case delay is not a bar to the claim to rectify the Register,⁴ as it is where relief is sought on the ground of misrepresentation.

Before the repeal of Section 25 of the Act of 1867 the Court would rectify the Register if shares agreed to be issued as fully paid had been issued without a contract being duly filed.⁵ The Court will also rectify if an allotment of shares is irregular,⁶ or if the company has acted on a forged transfer.⁷

If where a transfer is complete and in order, and left for registration, it is not registered owing to any unnecessary delay on the part of the company, the name of the transferor will be removed and that of the transferee placed on the Register, although a winding up has commenced in the interval, and the Order may be retrospective in effect, so as to render valid notices of dissent given by the transferee to a scheme of reconstruction,⁸ or to relieve the transferor from liability as a contributory.⁹ But no alteration will be made if the transfer is not registered owing to a decision of the directors, *boni fide* come to and within their powers, that the transfer ought not to be registered,¹⁰ or if something remains to be done to complete the transfer,¹¹ or if the Articles require the directors to exercise their discretion and they have not done so¹²; and if there is a pending

¹ A purchase of shares completed by a transfer of the property cannot be set aside on the ground of an innocent misrepresentation (*Seddon v. North East Salt Co.*, [1905] 1 Ch. 320), but a contract to take shares from the company is like an agreement of partnership and is not treated as completed by the allotment of the shares.

² *Askew's Case*, [1874] 9 Ch. 661.

³ *Oakes v. Turquand*, [1867] L. R. 2 H. L. 325; *Alabaster's Case*, [1860] 7 Eq. 273; *Baillie's Case*, [1898] 1 Ch. 110.

⁴ *Gorriessen's Case*, [1873] 8 Ch. 507; *Wynne's Case*, [1873] 8 Ch. 1002; *Beck's Case*, [1874] 9 Ch. 392; *Baillie's Case*, [1898] 1 Ch. 110.

⁵ *Darlington Forge Co.*, [1887] 34 Ch. D. 622.

⁶ *Honer Gold Mines*, [1888] 39 Ch. D. 546; *Portuguese Copper Mines*, [1889] 42 Ch. D. 160.

⁷ *Bahia and San Francisco Railway Co.*, [1868] L. R. 3 Q. B. 584.

⁸ *Sussex Brick Co.*, [1904] 1 Ch. 598.

⁹ *Nation's Case*, [1866] 3 Eq. 77; *Hill's Case*, [1869] 4 Ch. 769, note.

¹⁰ *Alex. Mitchell's Case*, [1879] 4 App. Ca. 548; *Nelson Mitchell's Case*, [1870] 4 App. Ca. 624. ¹¹ *Marino's Case*, [1867] 2 Ch. 596.

¹² *Walker's Case*, [1866] 2 Eq. 554; *Union Debenture Corporation v. Fletcher*, 59 J. P. 708; *Hackney Pavilion, in re*, [1924] 1 Ch. 276, and see page 215.

dispute whether the company is in liquidation the Order will not be made, although the Judge has in an interlocutory proceeding decided that there is no winding up in operation.¹

The importance of these rules is great, because until a new member is entered in the Register the former holder of the shares remains liable in respect of any calls which may be made on the shares.

The Court has power to rectify the Register after as well as before a Winding-up Order has been made (Section 163), and the Order may be made retrospective.² Thus by an application to the Court the liquidators can enforce the liability of persons who are not, but ought to have been, entered in the Register of Members.

Where a company is being wound up by the Court or subject to its supervision, transfers of shares are, unless the Court otherwise orders, void (Section 205, Sub-section 2); and where the company is being wound up voluntarily any transfers of shares, unless made to or with the sanction of the liquidator of the company, are void (Section 205, Sub-section 1). In the former case the exercise of the power of the Court is discretionary, and an Order will not be made except on strong grounds.³

Colonial Registers.

As many companies registered in the United Kingdom carry on business wholly or partially in the Colonies, and shares are held to a large extent by persons resident there, involving frequent local dealings in such shares, an Act was passed in 1883 (re-enacted by Sections 34 to 36 in 1908) providing for the keeping of local Colonial Registers.⁴ Under the Act, any such company may, "if so authorised by its Articles, cause to be kept in any Colony in which it transacts business a Branch Register of Members resident in that Colony" (Section 34, Sub-section 1).

The company must give the Registrar notice of the situation of the office where the Colonial Register is kept, and of any change in its situation or of the discontinuance of the office (Sub-section 2).

The Register must be kept in the same manner as the Principal Register, and the Colonial Courts have jurisdiction in regard to rectification of the Register, and in respect of offences in regard to refusing inspection (Section 35).

¹ *Violet Consolidated Gold Mining Co.*, [1899] W. N. 66, 68 L. J. Ch. 535, 80 L. T. 684.

² See *Sussex Brick Co.*, [1904] 1 Ch. 598, where a transfer was ordered to be registered as on a date before the liquidation, so as to allow the transferee the right of a dissentient.

³ *Onward Building Society*, [1891] 2 Q. B. 46.

⁴ The term "Colony" includes British India and the Commonwealth of Australia (Section 34, Sub-section 3). By The Foreign Jurisdiction Act, 1913, Sections 34 to 36 of The Companies (Consolidation) Act, 1908, are added to the Schedule of Acts contained in The Foreign Jurisdiction Act, 1890.

The particulars required by Section 25 must be entered in the Colonial Registers, which are to be open to inspection and subject to other conditions similar to Registers in the United Kingdom; and a copy of every entry in any such Register is to be sent to the company's registered office in England, Scotland, or Ireland, as the case may be, where duplicates of the Colonial Registers are to be kept, and "duly entered up from time to time" (Section 35).

The shares in the Colonial Register are to be distinguished from those in the Principal Register, and no transaction in the Colonial shares is to be entered in any other Register except the before-mentioned duplicate.

It is not easy to say what business is sufficient to justify the opening of a Branch Register. Lindley, L. J., has said, "It is part of the business of the company to give certificates of title to shares in it, and to register transfers of such shares, and to place the names of transferees on its own books,"¹ from which it would seem that the keeping of a Branch Register would itself be transacting business.

Some Colonies (*e.g.* Western Australia) require a Colonial Register to be kept as a condition of carrying on business in the Colony.

The company may discontinue any Colonial Register when the entries are to be transferred to some other Colonial Register or the Principal Register (Section 35, Sub-section 5).

A transfer of a share in the Colonial Register is exempt from British stamp duty unless executed in the United Kingdom, and on the death of a member registered in the Colonial Register his shares, for the purpose of probate, letters of administration, or inventory and death duties, are to be part of his estate only if he died domiciled in the United Kingdom (Section 36).

THE REGISTER OF MORTGAGES.

In addition to registering with the Registrar certain mortgages and charges as required by Section 93 (see page 272, *infra*), every limited company must keep a Register of all Mortgages and Charges specifically affecting property of the company, in which must be entered a short description of the property mortgaged or charged, with the amount of charge created, and, except in the case of securities to bearer, the names of the mortgagees or persons entitled to such charge. If any property of the company is mortgaged or charged without such entry being made, every director, manager, or other officer of the company who knowingly and wilfully authorises or permits the omission is liable to a penalty of fifty pounds (Section 100).

¹ Bishop v. Balkis Consolidated Co., [1890] 25 Q. B. D. 520.

However, a mortgagee, even though a director of the company, does not lose his security by an omission to see that it is entered in the Register of Mortgages,¹ although he does so if the mortgage is one that requires registration under Section 93 and is not registered with the Registrar (see page 275, *infra*). The priority of mortgages is not affected by any imperfection of the Register kept by the company.²

Debentures containing a specific charge on the property of the company clearly must be included in this Register, but not those only containing a floating charge. Where such debentures are payable to bearer the names of the persons entitled need not be specified.

Under Section 101 the Register of Mortgages, and copies of all mortgages and charges which are required to be registered with the Registrar, must be open at all reasonable times to the inspection of any creditor or member of the company without fee, and the Register of Mortgages must be open to inspection by any other person on payment of a fee not exceeding one shilling; but on a winding up the Register cannot be inspected without an Order of Court.³ The right to inspect the Register of Mortgages involves a right to take copies of it.⁴ Any officer refusing to allow such inspection is liable to a penalty of five pounds, and a further penalty of two pounds for every day during which such refusal continues, and every director or manager permitting such refusal is liable to the same penalties. In addition to the above penalties, as respects companies registered in England and Ireland any Judge sitting in Chambers, or in the Stannaries the County Court Judge, may by an Order compel an immediate inspection of the Register (Section 101, Sub-section 2).

There is no provision in the Act for keeping a Register of Debenture Holders as distinct from the Register of Mortgages; but the debentures or trust deed usually provide for such a Register being kept, and Section 102 requires that every Register of Holders of Debentures of a company shall (except when closed, in accordance with the Articles, for any specified period or periods, not exceeding thirty days in any year) be open to inspection by the registered holder of any such debentures and by any shareholder, subject to any reasonable restrictions which the company may in general meeting impose, so that at least two hours a day

¹ Wright v. Horton, [1887] 12 App. Cas. 371.

² General South American Co., [1870] 2 Ch. D. 337.

³ Somerset v. Land Securities Co., [1897] W. N. 20.

⁴ Nelson v. Anglo-American Land Co., [1897] 1 Ch. 130. Note that, as the sections do not give the persons inspecting a right to have a copy supplied on payment, the case is different from that of the Register of Members (see page 94, *supra*).

are appointed for inspection, and every such debenture or share holder is entitled to a copy of all or part of the Register on payment of sixpence for every hundred words. The penalties for default are five pounds, and two pounds for every day during which the default continues, and are imposed on the company and every officer knowingly authorising the default.

The same section gives every debenture holder a right to a copy of the trust deed securing his debentures, if printed on payment of one shilling, and if not printed on payment of sixpence for every hundred words, under the same penalties for default (see page 269, *infra*).

THE REGISTER OF DIRECTORS OR MANAGERS.

Under Section 75, as extended by The Companies (Particulars as to Directors) Act, 1917, the company is required to keep a Register of its Directors or Managers, and to file copies thereof or of any changes therein. This applies to all companies except Associations Not for Profit, which are relieved from the obligation to file copies of the Register (but not from the provisions of Section 2 of the Act of 1917 requiring Particulars respecting Directors to be filed at the time of incorporation). The penalty for default in keeping the Register or neglecting to file a copy of it with the Registrar of Companies is five pounds a day.

The Annual Return of Members and Summary of Capital and Shares required by Section 26 must also state the names and addresses of the persons who are the directors of the company at the date of the Return.

Further particulars in regard to the Register and Return are given on page 446, *infra*.

THE COMMON SEAL.

Every limited company must be provided with a Common Seal, on which it "shall have its name engraven in legible characters" (Section 63, Sub-section 1 (*b*)). If any director, manager, or officer of a company "uses or authorises the use of any seal purporting to be a seal of the company whereon its name is not so engraven," he shall be liable to a penalty of fifty pounds (Section 63, Sub-section 3). As has been remarked on page 16, *supra*, the name of a company should be correctly given in every detail. Especially is this necessary in the case of the Common Seal, the use of which is the official signature of the company.

The seal is impressed upon share and stock certificates (Section 23), trust deeds, debentures, contracts, mortgages, and other important documents, usually in the presence and with the

authority of two directors, who sign the document, which is then countersigned by the secretary. An impression made in ink with a wooden or rubber block is a valid sealing,¹ but a printed circle with the letters "L. S." or words "Place for Seal" is not.² Any contract which if made between private persons would be by law required to be in writing, and if made according to English law to be under seal, may be made on behalf of a company in writing and under its common seal, and may in the same manner be varied or discharged; any contract which if made between private persons would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the company in writing, signed by any person acting under its authority, express or implied, and may in the same manner be varied or discharged; and any contract which if made between private persons would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under its authority, express or implied, and may in the same manner be varied or discharged (Section 76).

The mere affixing of the seal of a corporation is sufficient without witnesses, and, unless the Articles provide that the directors shall attest, it is not necessary, although it is customary, for them to do so. Where the Articles have such a provision the signature of the directors is not an attestation in the ordinary sense, but is part of the execution of the deed,³ and it would seem to follow that without such signatures the execution is not complete; but there is no direct authority to this effect. Under the old law fixing the common seal was equivalent to delivery⁴; but now, unless the contrary is intended, delivery is also necessary.⁵ Delivery may be conditional and to take effect only upon some event happening, *e.g.* upon the consideration being paid; in such a case until the fulfilment of the condition the document is an escrow or scrip, and has no effect as a deed,⁶ but on the performance of the condition the deed becomes operative without further delivery. Proof of the seal may be given by anyone who knows it, and it is not necessary to call a person who saw it affixed.⁷ If the seal of a corporation is found to be attached

¹ Reg. v. St. Paul's, Covent Garden, [1844] 7 Q. B. 555.

² Balkis Company, [1887] 36 W. R. 302.

³ Deffell v. White, [1866] L. R. 2 C. P. 144.

⁴ Comyn's Digest, Fast A, 3.

⁵ Derby Canal Co. v. Wilmot, [1808] 9 East. 360; Mowatt v. Castle Steel and Iron Works, [1887] 34 Ch. D. 58; Merchants of the Staple v. Bank of England, [1888] 21 Q. B. D. 160.

⁶ Spitzel v. Chinese Corporation, [1809] 80 L. T. 347. As to escrow generally see Founding Hospital v. Crane, [1911] 2 K. B. 307.

⁷ Moises v. Thornton, [1799] 8 T. R. 307; Brounker v. Atkins, [1681] Skinn. 2.

to a deed it will be presumed to be regularly affixed, and those who assert the contrary must strictly prove their case.¹

A person having power to manage the affairs of a trading company has implied power to affix the seal.² But negligence of the company in leaving the seal in the custody of a dishonest person will not preclude the company from setting up that the seal was wrongfully affixed, and a forgery gives no title.³ Estoppel by negligence will only arise if the negligence is the proximate cause of the loss to the other party.⁴ Thus where a secretary, to aid his own frauds, wrongfully affixed the seal of the company to share certificates, and, having forged the signatures of two directors, issued the certificates apparently in the ordinary course of business, the company came under no liability to the honest holders of the share certificates.⁵

In Articles of Association provision is frequently made as to the occasions on which the seal shall be used. The seal is often secured by a bolt passed through part of the mechanism, and held in position by two padlocks. More frequently it is enclosed in a case with two locks, different persons holding the keys. The latter is recommended as the better method.

A company may by writing under its common seal empower any person to act as its attorney to execute deeds on its behalf in any place out of the United Kingdom (Section 78); or it may, if authorised by its Articles, have for use in any territory, district, or place out of the United Kingdom a separate official seal, and by writing authorise any person appointed for the purpose to affix the same. Such person when using the seal must certify the date and place of affixing it (Section 79). This local seal must be a facsimile of the original seal, with the addition that it must show on its face the name of the locality where it is to be used.

¹ *Clarke v. Imperial Gas Co.* [1833] 4 B. & Ad. 315; *Anon.*, [about 1730] 12 Mod. 423.

² *Re Contract Corporation*, [1868] 3 Ch. 105, 116. *Higginstaff v. Rowatt's Wharf*, [1896] 2 Ch. 93.

³ *Merchants of the Staple v. Bank of England*, [1888] 21 Q. B. D. 160.

⁴ *Bank of Ireland v. Trustees of Evans' Charity*, [1855] 5 H. L. C. 389.

⁵ *Ruben v. Great Fingull Consolidated Co.*, [1904] 2 K. B. 712; affirmed in the House of Lords, [1906] App. Cas. 439.

CHAPTER VIII.

MATTERS PRELIMINARY TO COMMENCEMENT OF
BUSINESS.

PROMOTION AND PROMOTERS.

THE functions of Promoters and their duties and liabilities are very important matters in connection with the formation and early existence of a company, and therefore clear ideas should be formed upon these points. Yet the Courts have always refused to define exactly what constitutes a "Promoter"—and rightly; for if a rigid definition were given, those who desire to avoid the liabilities of the position would be careful to come very close to the line without crossing it. The best description is that of Bowen, L. J.:—"The term 'Promoter' is a term not of law but of business, usefully summing up in a single word a number of business operations, familiar to the commercial world, by which a company is generally brought into existence."¹ But probably there should be added "and by which its capital is provided." The promotion does not necessarily cease with the registration of the company, for "a person not a director may be a Promoter of a company which is already incorporated, but the capital of which has not been taken up."²

In seeking to ascertain who are the Promoters of a company it is useful to ask—(1) "Who started the idea of forming a company for the purpose in question?" (2) "Who settled what was to be included in the Memorandum and Articles of Association and in the Prospectus, or gave the lawyers instructions to prepare them and information upon which they might be prepared?" (3) "Who undertook the liability for the costs of preparing those documents, registering the company, and making the preliminary agreements?" (4) "Who sought out the persons who ultimately became the first directors, and induced them to undertake the office?" (5) "Who procured the subscription of the capital?" And, lastly, the famous question "*Cui bono?*"—"Who benefited by the formation of the company?"

It must be remembered, however, that none of these questions is decisive. A man may have done one or more of these things,

¹ Whaley Bridge Printing Co. v. Green, [1880] 5 Q. B. D. 109.

² Emma Silver Mining Co. v. Lewis, [1879] 4 C. P. D. at page 407.

and yet not be a Promoter; or a man may have kept in the background and have appeared to do none of these things, and yet be a Promoter. Usually, however, persons who have busied themselves in procuring subscriptions or underwriting will find it very hard to escape from being held to be Promoters. Further, a man may be a Promoter who is only acting as agent for others, or as director of a promoting syndicate, if he has personally taken an active part in the promotion.¹

Very frequently the vendors of property to a company are the Promoters.² But, on the other hand, the owners of property may have been asked, "If a company is formed to acquire your property, will you sell it? and, if so, at what price?" If they have done no more than agree to sell they will not be Promoters; nor will the solicitors who, as part of their professional duty, prepared the contracts.³ But it is to be noted that the Courts will look at the substance of a transaction, and vendors or others who are in reality the Promoters will not escape liability by the interposition of a nominal vendor or a nominal Promoter, who professes to purchase and resell the property or to undertake the financial operations incident to forming and floating a company.

For instances of decisions as to who are Promoters see the cases cited below.⁴

The relation of a Promoter to the company he is about to form, although not strictly that of a trustee to his *cestui que trust*, or of an agent to his principal, is of the same nature; and it follows that he may not secretly make a profit for himself, nor otherwise benefit at the expense of the company. Thus Lindley, L. J., in delivering the judgment of himself and Cotton and Lopes, L. JJ., said, "Although not an agent of the company nor a trustee for it before its formation, the old familiar principles of the law of agency and of trusteeship have been extended, and very properly extended, to meet such cases. It is perfectly well settled that a Promoter of a company is accountable to it for all moneys secretly obtained by him from it, just as if the relationship of principal and agent, or of trustee and *cestui que trust*, had really existed between him and the company when the money was so obtained."⁵ It was

¹ Lydney and Wigpool Co. v. Bird, [1886] 33 Ch. D. at page 94.

² Twycross v. Grant, [1877] 2 C. P. D. 469; Beck v. Kantorowicz, [1857] 3 K. & J. 230; Gluckstein v. Barnes, [1900] App. Ca. at page 249.

³ Re Turner, [1884] 53 L. J. Ch. 42, 49 L. T. 20.

⁴ Twycross v. Grant, [1877] 2 C. P. D. 469; Bagnall v. Carlton, [1877] 6 Ch. D. 371; Emma Silver Mining Co. v. Lewis, [1879] 4 C. P. D. 396; Erlanger v. New Sombrero Phosphate Co., [1879] 3 App. Ca. 1218, Emma Silver Mining Co. v. Grant, [1879] 11 Ch. D. 918, Nant-y-Glo and Blaenau Co. v. Grave, [1879] 12 Ch. D. 738, Lydney and Wigpool Co. v. Bird, [1886] 33 Ch. D. 85.

⁵ Lydney and Wigpool Co. v. Bird, [1886] 33 Ch. D. at page 94.

further held in the same case that the fact that the Promoter was an agent for others did not exonerate him from liability. Again, Lord Cairns and Lord Blackburn decided that Promoters undoubtedly stand "in a fiduciary position towards the company."¹ The fiduciary relationship extends, moreover, not only to the company as constituted at the time, but also to future allottees of shares; so that disclosure of profits made by the Promoters must be made not only to the subscribers to the Memorandum, but also either to an independent Board or to all the subscribers for shares.²

A convenient summary of some of the main principles in relation to contracts with Promoters and persons in a fiduciary position is to be found in the judgment of Lord Lindley (then Master of the Rolls) in *Lagunas Nitrate Co. v. Lagunas Syndicate*³:—

"The first principle is that in equity the Promoters of a company stand in a fiduciary relation to it, and to those persons whom they induce to become shareholders in it, and cannot in equity bind the company by any contract with themselves as Promoters without fully and fairly disclosing to the company all material facts which the company ought to know. *Erlanger v. New Sombrero Phosphate Co.*⁴ is the leading authority in support of this general proposition.

"The second principle is that a company when registered is a corporation capable by its directors of binding itself by a contract with themselves as Promoters if all material facts are disclosed.⁵ *Salomon v. Salomon & Co.*⁶ is the leading authority for this principle.

"The third principle is that the directors of a company, acting within their powers and with reasonable care, and honestly in the interest of the company, are not personally liable for losses which the company may suffer by reason of their mistakes or errors in judgment. *Overend, Gurney & Co. v. Gibb*⁷ is the leading authority on this head.

"A fourth principle, not confined to companies, but extending to them, is that a contract can be set aside in equity on proof that one party induced the other to enter into it by misrepresentations of material facts, although such misrepresentations may not have been fraudulent.

¹ *Erlanger v. New Sombrero Phosphate Co.*, [1879] 3 App. Ca. 1236.

² *British Seamless Paper Box Co.*, [1881] 17 Ch. D. 467, *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 302.

³ [1890] 2 Ch. at p. 422.

⁴ [1879] 5 Ch. D. 73, 3 App. Ca. 1218.

⁵ It should be noted that this disclosure must be to independent persons, not to themselves as directors or their nominees. This appears from the case here being quoted. See [1899] 2 Ch. page 431 *et seq.*; *Erlanger v. New Sombrero Phosphate Co.*, [1879] 3 App. Ca. 1218; and *Gluckstein v. Barnes*, [1900] App. Ca. 210, affirming *re Olympia, Limited*, [1898] 2 Ch. 153.

⁶ [1897] App. Ca. 22.

⁷ [1872] L. R. 5. H. L. 480.

"A fifth principle is that a voidable contract cannot be rescinded or set aside after the position of the parties has been changed, so that they cannot be restored to their former position. Fraud may exclude the application of this principle, but I know of no other exception."

In the case in question it was held by a majority of the Court of Appeal (Lindley, M. R., and Collins, L. J.) that on the facts the company had notice that the directors were also vendors, and therefore the fact that they did not constitute an independent board was not a sufficient ground for setting aside the contract, as there was no material misrepresentation made to the persons who were members of the company at the date of the contract, these being the directors themselves; and, further, that although the prospectus was in some respects misleading, the subsequent alteration in the position of the company rendered rescission impossible. But Rigny, L. J., thought that the facts were such as to render the directors liable.

The fiduciary position commences as soon as the Promoter begins to act for or promote the company, but not earlier. The fact of acquiring a property with the intention of ultimately forming a company which shall acquire and develop it does not render the purchaser accountable for the profit he makes on the resale, so long as the company, on coming into existence, is informed that the person selling to the company and the Promoter are identical.¹ And the same rule applies even though the acquisition is only in the form of an option or uncompleted contract,² or where the Promoter contracted to sell "the benefit of a lease agreed to be granted," and in fact there was no agreement for the lease, but only negotiations which ultimately resulted in a lease which was assigned to the company.³ But any profit which the Promoter makes after he has begun to promote the company, and the benefit of any contracts into which he enters during that period, *prima facie* belong to the company⁴; for the rule is that where an agent sells what is already his own property to his principal the contract may be rescinded if the principal is ignorant that the agent is himself the vendor, but where an agent is purchasing on behalf of his principal the bargain is the bargain of the principal, who is entitled to the whole benefit, and the agent must not intercept any portion of the profit

¹ *Bentnick v. Fenn*, [1887] 12 App. Ca. 652; *Gover's Case*, [1875] 1 Ch. D. 182; *Erlanger v. New Sombrero Phosphate Co.*, [1879] 3 App. Ca. 1218; *Ladywell Mining Co. v. Brookes*, [1887] 35 Ch. D. 400. Compare *Burlaud v. Earle*, [1902] App. Ca. 98—the case of a director purchasing privately and selling to his company.

² *Gover's Case*, [1876] 1 Ch. D. 182, followed in *Ladywell Mining Co. v. Brookes*, [1887] 35 Ch. D. 400.

³ *Omnium Electric Palaces v. Baines*, [1911] 1 Ch. 332.

⁴ *Ladywell Mining Co. v. Brookes*, [1887] 35 Ch. D. 400; *Cape Breton Co.*, [1885] 29 Ch. D. 795.

(e.g. by taking commission from the vendors, or by making a resale to his principal at an enhanced price).¹ It is also the duty of the agent to secure the purchase for his principal on the most favourable terms obtainable. It is, however, too much to say that what a Promoter acquires after he has commenced the promotion *ipso facto* belongs to the company; the question whether the Promoter is in fact acquiring as agent for the intended company or for himself is one of fact; but where the scheme throughout is that he shall resell at a profit the natural inference is that he is not acting as agent for the company, and if there is no concealment of the fact that he is the vendor when he resells the company cannot claim the profit.²

If the Promoter was not at the time he bought in a fiduciary position, though subsequently and at the time of his resale to the company he is in a fiduciary position and does not disclose his interest, the company is entitled to rescind. If in such a case rescission has become impossible, the company cannot recover from the Promoter, as money had and received, the profit he has made, or damages,³ unless it can be shown that he has caused loss to the company by making fraudulent statements.⁴

How far a Promoter is agent or trustee for a company not yet formed is not clearly laid down; but it is decided that immediately upon the registration of the company he is under fiduciary obligations, not only to the company as originally constituted, but also as consisting of future allottees, and therefore Promoters and Directors will not be protected by disclosures made before the public have joined the company unless there is an independent board or body of shareholders to receive and act upon the information, and the directors who participate in the profits must not be counted as independent.⁵ Thus mere communication to the subscribers to the Memorandum of Association who are clerks in the vendor's office is obviously a farce, even though they hold a meeting and are the only members of the company; and, equally, disclosure to directors who are mere nominees of the vendors or Promoters will not be

¹ "The profits directly or indirectly made in the course of or in connection with his employment by a servant or agent, without the sanction of the master or principal, belong absolutely to the master or principal." By the Court (*Morrison v. Thompson*, [1874] L. R. 9 Q. B. at page 484). ² *Omnium Electric Palaces v. Haines*, [1914] 1 Ch. 332.

³ *Gover's Case*, [1876] 1 Ch. D. 182; *Cape Breton Co.*, [1884] 26 Ch. D. 221, [1885] 29 Ch. D. 795; *Ladywell Mining Co. v. Brookes*, [1887] 34 Ch. D. 308, 35 Ch. D. 400; *Lady Forrest (Marchison) Gold Mine*, [1901] 1 Ch. 582, *Burland v. Earle*, [1902] App. Ca. 98; *Jacobus Marler Estates v. Marler*, [1913] 114 L. T. 640, note; *Cook v. Deeks*, [1916] App. Ca. 554. But in *Beutnick v. Penn*, [1887] 12 App. Ca., Lord Herschell, at page 664, suggested there might be a remedy in damages.

⁴ *Leeds and Hanley Theatres of Varieties*, [1902] 2 Ch. 809.

⁵ *Leeds and Hanley Theatres of Varieties*, [1902] 2 Ch. 809; *Fitzroy Bessemer Co.*, [1895] 31 W. R. 312; *Erlanger v. New Southern Phosphate Co.*, [1879] 3 App. Ca. 1218; *Olympia, Limited*, [1898] 2 Ch. 140; *Gluckstein v. Barnes*, [1900] App. Ca. 240.

sufficient.¹ In such a case the information should be given in the prospectus²; and even if all the facts are known to all the members of the company at the time the contract is made, but a misleading prospectus is subsequently issued by the Promoters to the public inviting them to join the company, the Promoters will be liable.³

If, however, there is no intention of making a public issue of shares, and no such issue is in fact made, the knowledge by all the directors and members of the company of the facts will exonerate the Promoters, even where the purchase price has been greatly inflated.⁴

Thus where five persons purchased a property for seven thousand pounds and a few days afterwards formed a company consisting of themselves only, to which they sold the property for fifteen thousand pounds payable in debentures carrying twelve per cent., it was held in a subsequent liquidation that the transaction was valid and the debentures could not be impeached.⁵

It has become common to insert an Article to the effect that the company shall purchase a specified property, and that no objection shall be taken on the ground that the Promoter is vendor, or that there is no independent board, and that every member of the company shall be deemed to become a member on these terms. Such an Article is useful as negating any concealment of the fact that the Promoter was vendor, but cannot be relied upon as a complete protection. "Promoters cannot relieve themselves of their general equitable obligations by any astuteness in the drafting of the regulations which they prepare for their company."⁶

"A Promoter whose duty it is to disclose what profits he has made does not perform that duty by making a statement not disclosing the facts, but containing something which, if followed up by further investigation, will enable the inquirer to ascertain that profits have been made and what they amounted to."⁷ Therefore, a reference in the prospectus to contracts is not a sufficient disclosure of profits unless the terms of the contracts are fairly stated.

¹ *Olympia, Limited*, [1898] 2 Ch. 119; *Gluckstein v. Barnes*, [1900] App. Ca. 240. Compare *Kaye v. Croydon Tramways*, [1898] 1 Ch. 358, and *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. at page 431.

² *Leeds and Hanley Theatres of Varieties*, [1902] 2 Ch. 800.

³ *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. at page 428.

⁴ *Re Ambrose Lake Tin Co.*, [1880] 14 Ch. D. 390; *British Seamless Paper Box Co.*, [1881] 17 Ch. D. 467; *Innes & Co.*, [1903] 2 Ch. 254; *Attorney-General for Canada v. Standard Trust Co.*, [1911] App. Ca. 498.

⁵ *Express Engineering Works*, [1920] 1 Ch. 466.

⁶ *Per Sargant, J.*, *Omnium Electric Palaces v. Barnes*, [1914] 1 Ch. at page 346; see also *per Cozens-Hardy, L. J.*, at page 351. The form of Article in question is usually called "Lord Davey's Clause," having been originally drafted by Sir Horace Davey when at the Bar.

⁷ *Olympia, Limited*, [1898] 2 Ch. 149; affirmed *Gluckstein v. Barnes*, [1900] App. Ca. 240. Compare *Kaye v. Croydon Tramways*, [1898] 1 Ch. 358.

Where a Promoter has to account to the company for secret profits the measure of damage is the amount of profit made by the Promoter¹; but he is allowed to deduct from the amount all reasonable expenses he has been put to, and is liable only for the net profits made.²

Co-Promoters are not as such necessarily partners, nor is one Promoter necessarily the agent of the others, or the act or admission of one evidence against the others.³

When the company is in liquidation a Promoter may be examined privately under Section 174; and where in England a public examination is ordered in a compulsory winding up under Section 175,⁴ the Promoters are among the persons who may be publicly examined. Promoters may also in England be rendered liable for misfeasance under the procedure provided by Section 215.⁵ All these matters are dealt with in their proper places.

Promoters have not infrequently arranged for the shares of the company being underwritten, and paid the necessary commission out of the purchase money or other consideration they receive from the company. Section 89, Sub-section 3, renders the payment of the commission by the Vendors or Promoters lawful if made in such circumstances as would have justified direct payment of the commission by the company.

The death of a Promoter does not release his estate from obligations he has undertaken to find capital,⁶ nor from liability for moneys claimed by the company in respect of a breach of fiduciary duties or moneys secretly received and retained by him,⁷ nor does bankruptcy discharge the Promoter from similar liabilities.⁸

The remuneration of the Promoter usually comes out of the purchase money for the property acquired. In any case the amount paid within the two preceding years or intended to be paid to any Promoter must be disclosed in the Prospectus (Section 81, Sub-section 1 (*j*)) or in the Statement in Lieu of Prospectus (Section 82 and Schedule II.).

¹ Leeds and Hanley Theatres of Varieties, [1902] 2 Ch. 800.

² Emma Silver Mining Co. v. Grant, [1879] 11 Ch. D. 918; Lydney and Wiggpool Co. v. Bird, [1886] 33 Ch. D. 55.

³ Reynell v. Lewis, [1846] M. & W. 517; Wyld v. Hopkins, *ibid.*; Maddick v. Marshall, [1864] 16 C. B. N. S. 387, 17 C. B. N. S. 829. See "Landley on Companies," Sixth Edition, page 194.

⁴ The Companies Act, 1890, did not apply to Scotland or Ireland, and Sections 175 and 215 of 1908 maintain the distinction. Persons other than Promoters were liable for misfeasance under Section 165 of 1862, and this liability is re-enacted for Scotland and Ireland by Section 215 of 1908.

⁵ See previous note.

⁶ *Re Worthington, ex parte Pathé Frères*, 1914] 2 K. B. 290.

⁷ Munietta v. Concha, [1889] 40 Ch. D. at page 553; Phillips v. Homfray, [1883] 24 Ch. D. 439; New Sombrero Phosphate Co. v. Erlanger, [1877] 5 Ch. D. at page 117.

⁸ Emma Silver Mining Co. v. Grant, [1881] 17 Ch. D. 122.

PRELIMINARY AGREEMENTS.

Whether the company is formed to acquire a business, to work a mine, to develop a patent, to undertake financial business, or for any other purpose, it seldom issues a prospectus without having entered into preliminary agreements for the purchase of the property or rights to be acquired, or for securing the services and connection of some manager or expert.

As the Promoters of the company will desire to offer the benefit of such agreements or contracts as an inducement to the public to take shares, it becomes necessary that the contracts should be made before the formation of the company, or at least before the general allotment of shares, and accordingly an agreement or contract is usually prepared before the issue of the prospectus. Where incorporation of the company has not been effected the contract may be expressed to be made between the vendor and the company, the draft being initialled for the purpose of identification, or it may be made between the vendor and a trustee for the intended company and dated and executed; but in the latter case the company is not bound by the contract until it has entered into a direct agreement, after incorporation, to become so, since a company cannot ratify a contract made before it came into existence,

It will be observed that a contract can be made with a trustee for the company before the company has any existence, in which case the trustee will be personally bound by the contract unless he expressly protects himself from liability by including a power to rescind it.¹ It is usual in such a case to make it one of the objects of the company mentioned in the Memorandum, and also to provide in the Articles of Association that the directors shall adopt the preliminary agreement; but this will not lay the company under obligation unless a distinctly new contract is made by which the company agrees to be bound by the terms of the preliminary agreement.² Nor will a resolution of the board of the new company adopting the agreement create a contract between the new company and the vendor.³ A new contract may, however, sometimes be inferred from the circumstances and the conduct of the parties.⁴ But the mere fact that the directors of the company think they are bound by

¹ *Kelner v. Baxter*, [1867] L. R. 2 C. P. 174; *Empress Engineering Co.*, [1881] 16 C. D. 125, and the cases cited in note 5.

² *Kelner v. Baxter*, [1867] L. R. 2 C. P. 174; *Scott v. Lord Ebury*, [1867] L. R. 2 C. P. 255.

³ *Re Olympia, Limited*, [1898] 2 Ch. 108; *Northumberland Avenue Hotel Co.*, [1896] 33 Ch. D. 16; *Natal Land Co. v. Pauline Colliery*, [1904] App. Ca. 120.

⁴ *Johannesburg Hotel Co.*, [1891] 1 Ch. 119; *North Sydney Investment Co. v. Higgins*, [1899] App. Ca. 263.

⁵ *Howard v. Patent Ivory Co.*, [1888] 38 Ch. D. 156; *Natal Land Co. v. Pauline Colliery* [1904] App. Ca. at page 126.

the contract with the trustee, and act accordingly, is not enough, even though large sums of money are expended and work is done in that mistaken belief.¹ The Northumberland Avenue Hotel case¹ was one of great hardship, but, although often the subject of remark, it is followed without hesitation.² The question what facts are sufficient to establish a *new* contract has not been discussed in the House of Lords or Privy Council, as in the case which came before the Privy Council³ it was held that the agent's authority to contract had been determined.

Where the contract is expressed to be made with the company itself, it is sometimes prepared before the incorporation of the company, and then referred to in the Memorandum and Articles of Association as an "agreement already drawn up and intended to be executed," and, for identification, signed or initialled by some of the subscribers to the Memorandum of Association or by a solicitor. In this case the agreement requires to be executed by the company, and this must be done after proper consideration by the directors and not merely *pro formâ*: in fact, they must exercise their judgment upon it, and if they are not an independent board the company may repudiate the contract.⁴

By Section 87, Sub-section 3, any contract made by a company before the date at which it is entitled to commence business is provisional only, and is not binding on the company until that date, but on that date it becomes binding. It is thought that if this event does not happen within a reasonable time the Court will have power, at the instance of the other party, to declare the contract at an end: it can hardly be that a vendor would be bound indefinitely. But a person contracting with the company will be wise to include in any contract made before the date in question a provision that if the company does not become entitled to commence business within a specified period the contract shall be void or be liable to rescission by either party.

By Section 83 a company is forbidden, prior to the statutory meeting, to vary the terms of any contract referred to in the prospectus or statement in lieu of prospectus, except subject to the approval of the statutory meeting. Section 65, Sub-section 3 (e), also prescribes that the directors shall, in the report to be

¹ Northumberland Avenue Hotel Co., [1886] 33 Ch. D. 16. In Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co., [1902] 1 Ch. 146, the plaintiff company had granted a licence to one Phelps, who had agreed to sell it to the defendant company, which made use of it, but it was held there was no privity between the plaintiff company and the defendant company, and that the former could not sue the latter for royalties, but had a lien on the patents for the royalties (Dansk Rekytriffel Syndikat v. Snell, [1908] 2 Ch. 127).

² The latest case is English and Colonial Produce Co., [1906] 2 Ch. 435.

³ Natal Land Co. v. Pauline Colliery, [1904] App. Ca. 120.

⁴ See page 110, *supra*.

submitted seven days before the statutory meeting, give particulars of any contract the modification of which is to be submitted to the meeting for approval, and the details of the proposed modification.

It follows from Section 89 that nothing must be added to the purchase price of property or contract price for work to enable the vendor to the company or the contractor to pay commission for placing the share capital, unless the payment is authorised by the Articles, and stated in the prospectus or statement in lieu of prospectus.

Where part of the purchase consideration is payable in shares the directors ought not to agree to give more shares than represent the cash value of the property, for, although the Court will not inquire into the value of the consideration *bond fide* given for the issue of fully or partly paid shares (see page 198, *infra*), it is to be assumed that twenty shillings in the pound is received by the company for all shares issued. A valuation of the property by the directors must be made, and an agreement to allot as fully paid a proportion of all future issues of shares is invalid.¹

Persons who are not part owners of the property must not be joined to enable them to receive a part of the fully paid shares forming the consideration. Directors knowingly allowing Promoters to obtain remuneration by such an arrangement are guilty of misfeasance.²

The purchase consideration is usually first stated in a lump sum, thus:—"The vendor shall sell and the company shall purchase [the property] at the price of £100,000, which shall be satisfied by the payment of £50,000 in cash and the allotment to the vendor or his nominees of 50,000 shares of £1 each in the capital of the company, credited as fully paid, numbered to ." It should be noted that if this form is not used, but it is simply stated that the vendor is to take "£50,000 worth of fully paid shares," this means fully paid shares of the market value of £50,000.³

If directors receive any benefit under the preliminary agreement, it should be fully disclosed. They will be liable to repay to the company any secret profits, and it is misfeasance for them to accept any gifts from the vendors without the full knowledge of the company. It is also wrong and improper for the directors to accept any gift whatever while the consideration or completion of the contract is still open.⁴

¹ Hong Kong & China Gas Co. v. Glen, [1914] 1 Ch. 527.

² Bland's Case, [1893] 2 Ch. 612.

³ McIlquham v. Taylor, [1895] 1 Ch. 63.

⁴ See Eken v. Ridsdale's Railway Jump Co., [1899] 23 Q. B. D. 368 *Archer's Case*, [1892] 1 Ch. 322; *Hay's Case*, [1875] 10 Ch. 503.

Questions relating to the contracts which require to be disclosed in the prospectus or statement in lieu of prospectus are considered on pages 129 to 132, *infra*.

STAMP DUTIES ON AGREEMENTS AND CONTRACTS.

No matter so frequently raises questions as the stamp duty payable on agreements and contracts for sale and purchase, whether preliminary or otherwise. The law is contained in Section 59, Sub-section 1, of The Stamp Act, 1891, which is as follows:—

Any contract or agreement made in England or Ireland¹ under seal, or under hand only, or made in Scotland,¹ with or without any clause of registration, for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property except lands, tenements, hereditaments, or heritages, or property locally situate out of the United Kingdom, or goods, wares, or merchandise, or stock, or marketable accurities, or any ship or vessel, or part interest, share, or property of or in any ship or vessel, shall be charged with the same *ad valorem* duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest, or property contracted or agreed to be sold.²

Ad valorem stamp duty, at the rate of one pound per cent.³ on the consideration, is therefore payable upon the contract itself in respect of the purchase money for such property as the following:—

1. Equitable estates or interests in freeholds and leaseholds, whether in the United Kingdom or abroad (which includes hereditaments subject to a legal mortgage).
2. Patents, licences, trade marks, and copyrights.
3. Goodwill.
4. Book and other debts (including money on deposit at bank or elsewhere).
5. The benefit of contracts.

The Registrar will refuse to file any contract not stamped in this manner.⁴

¹ The limitation to contracts and agreements made in England, Ireland, or Scotland is removed by Section 7 of The Revenue Act, 1909.

² To avoid payment of the *ad valorem* duty in cases where the sum would be large the contract used sometimes to be executed abroad, and it was then contended that the contract was not either "made in England or Ireland" nor "made in Scotland." But Section 7 of The Revenue Act, 1909, now renders this evasion impossible.

³ Increased from 10s. per £100 by The Finance (1909-10) Act, 1910, Section 73; but where the consideration for a sale does not exceed £500 the duty is still 10s. per £100 if the instrument contains a statement in the prescribed form that the transaction does not form part of a larger transaction or series of transactions in respect of which the consideration exceeds five hundred pounds (see page 118, *infra*).

⁴ Reg. v. Registrar of Joint Stock Companies, [1888] 21 Q. B. D. 131. This was decided upon an application to file under Section 25 of The Companies Act, 1867. The same rule will apply under Section 88 of The Companies (Consolidation) Act, 1908, which expressly states that the contracts must be "duly stamped."

Ad valorem duty is not payable upon the contract, but is payable on the conveyance, assignment, or transfer in respect of—

1. Freeholds and leaseholds¹ which are not subject to a legal mortgage.
2. Marketable securities.

Ad valorem duty is not payable in this country in respect of—

1. Legal estate in property locally situate out of the United Kingdom.
2. Loose plant, stock-in-trade, and other goods and chattels, cash, bills of exchange, and other negotiable securities.
3. Ships or any interest therein.
4. British Government or Parliamentary Stocks or Funds.

Fixed plant and machinery form part of the factories or other premises to which they are attached, and therefore duty in respect thereof is payable on the contract or conveyance according to whether the title to the land is equitable or legal. But in the case of tenant's or trade fixtures on leasehold property which the lessee has, as against his landlord, a right to remove, the duty must be paid on the contract, as such fixtures have been held not to be an interest in land,² nor are they "goods, wares, or merchandise."³

The consideration for foreign patents or licences is liable to *ad valorem* duty on the contract, it being held that they are not property locally situate out of the United Kingdom.⁴ But the goodwill of a foreign business attached to business premises abroad is not within the section, and *ad valorem* duty is not chargeable on the purchase price in the agreement.⁵ Book debts of a foreign business, even though owing by persons resident abroad, are not property "locally situate out of the United Kingdom," and *ad valorem* duty is therefore payable on the apportioned consideration for the sale of the book debts.⁶

¹ At the rate of one pound per cent. See note⁴ on previous page.

² *Hallen v. Rander*, [1834] 1 C. M. & R. 266. See Alpe's "Law of Stamp Duties," Eighteenth Edition.

³ *Lee v. Gaskell*, [1876] 1 Q. B. D. 700. See also *Hobson v. Gorrings*, [1897] C. A. 1 Ch. 182.

⁴ *Smelting Co. of Australia v. Commissioners of Inland Revenue*, [1897] 1 Q. B. 175.

⁵ *Muller & Co.'s Margarine v. Commissioners of Inland Revenue*, [1900] 1 Q. B. 310; [1901] A. C. 217.

⁶ *Velasquez, Limited, v. Commissioners of Inland Revenue*, [1914] 3 K. B. 458.

The price payable for equitable interests in and options¹ over lands situate out of the United Kingdom must be included in the computation of the stamp duty on the contract,² the exception in the Act only applying to the legal estate in such lands.

An agreement for the sale of leaseholds, with a clause that if the lessor's consent to the assignment cannot be obtained a declaration of trust shall be executed, does not require an *ad valorem* stamp, even though in fact the trust is subsequently declared.³

Upon the conveyance or assignment of freeholds and leaseholds in respect of which *ad valorem* duty has not been paid on the contract, such duty is payable on the deed. A conveyance, in French form, of property situate in France, executed in France, requires stamping in England if the consideration consists of shares in an English company, for it is a sale of such shares.⁴

When any property is sold subject to a mortgage the amount of the mortgage is deemed part of the consideration, and duty is payable accordingly (Stamp Act, 1891, Section 57). In this case the duty is chargeable on the contract, and where it has been so paid it is not again charged on the conveyance or assignment, which should be denoted with the official "duty paid" stamp. If a resale of property for a higher consideration takes place before an actual conveyance, the duty on the second agreement for sale is *ad valorem* only on the excess over the original purchase price, but in any other case a deed stamp of ten shillings is sufficient.

On a contract for the sale of lands or hereditaments subject to an equitable mortgage Section 59 of the Stamp Act does not apply; for the legal estate is in the vendor, and the contract is not for the sale of an equitable estate or interest in property, and therefore requires no *ad valorem* stamp.

A sale in consideration of shares credited as fully or in part paid up requires the same stamp as if the consideration were cash, even though the vendors are the same persons as the members of the company, and hold the capital in the same proportions,⁵ and when the shares are those of a new company or are newly issued, the Commissioners require them to be taken as of their face value. A transfer of shares for shares equally requires an *ad valorem* stamp.⁶

¹ An option over lands is not an equitable estate or interest in property (*Müller & Co.'s Margarine v. Commissioners of Inland Revenue*, [1900] 1 Q. B. 310), but it is itself property, and being a mere personal right does not come within the exceptions in Section 59 (1) of The Stamp Act, 1891 (*Danubian Sugar Factories v. Commissioners of Inland Revenue*, [1901] 1 Q. B. 245).

² *Farmer v. Commissioners of Inland Revenue*, [1898] 2 Q. B. 141.

³ *West London Syndicate v. Commissioners of Inland Revenue*, [1898] 2 Q. B. 507.

⁴ *Inland Revenue Commissioners v. Maple & Co.*, [1908] App. Ca. 22.

⁵ *John Foster & Sons v. Commissioners of Inland Revenue*, [1894] 1 Q. B. 516.

⁶ *J. & P. Coats v. Commissioners of Inland Revenue*, [1897] 2 Q. B. 423.

By Section 55 of the Stamp Act, where the consideration is stock (which includes shares) or a marketable security, the duty is to be computed on the value thereof, and Section 6 provides that the average price on the day of the date of the instrument is the measure of such value. The Commissioners claim that if there are no dealings in the stock or marketable securities the nominal value at par must be taken; but there appears little justification for this contention, which in cases of the reconstruction of a company may be very important.

In preparing agreements or contracts for the sale of property to a company it is desirable to apportion the consideration among the different descriptions of property, showing how much is to be paid for freeholds, leaseholds, fixed plant and machinery and other fixtures, goodwill, book debts, patents, loose plant and machinery, stock-in-trade, and so on, in order that the duty chargeable may be the more easily assessed. If the document does not contain such an apportionment it must, when presented for stamping, be accompanied by a balance sheet or separate statement giving the requisite particulars. Where the property is subject to a mortgage the amount of the mortgage should be stated; and where the company is to satisfy the liabilities the amount of such liabilities should also be shown, as they are deemed part of the consideration. If the sale should not be completed the *ad valorem* duty paid on the contract is recoverable (Stamp Act, 1891, Section 59, Sub-sections 2, 3, and 6).

Where the amount or value of the consideration for the sale does not exceed £500 it is important to include "a statement certifying that the transaction thereby effected does not form part of a larger transaction, or of a series of transactions, in respect of which the amount or value, or the aggregate amount or value, of the consideration exceeds £500," using these exact words, so that the duty may be at the rate of ten shillings per one hundred pounds instead of one pound per cent.¹

Voluntary dispositions of property attract an *ad valorem* duty on the value of the property conveyed or transferred, with an exception in the case of a voluntary disposition of property to a body of persons incorporated by Special Act, if precluded by the Act from dividing profits among the members, and the property is to be held as an open space or for preservation for the benefit of the nation, and a further exception in the case of transfers for nominal consideration to secure a loan, or on the appointment of new trustees.² Note also that the duties on leases are doubled.³

¹ The Finance (1900-10) Act, 1910, Section 73.

² *Ibid.*, Section 74.

³ *Ibid.*, Section 75.

Many devices are resorted to in order to avoid payment of the duty, but the risk attending all such schemes far outbalances the amount sought to be saved.

STATEMENT IN LIEU OF PROSPECTUS.

Even when a company (not being a private company within the definition of Section 121 of the Consolidation Act, as amended by the Act of 1913) does not issue a prospectus to the public it must (unless it has previously to the 1st July, 1908, made an allotment of shares or debentures) give publicity to its affairs by filing the Statement in Lieu of Prospectus referred to in Section 82, signed by every person named therein as a director or proposed director, or his agent authorised in writing, and until it has done so it is forbidden to allot any of its shares or debentures. The form of the Statement is set forth in the Second Schedule to the Act, and requires that the following matters should be stated :—

1. The nominal share capital of the company.
2. The manner of its division.
3. The names, descriptions, and addresses of the directors or proposed directors.
4. The minimum subscription (if any) fixed by the Memorandum or Articles on which the company may proceed to allotment.
5. The number and amount of shares and debentures agreed to be issued as fully or partly paid up otherwise than in cash, and the consideration for such intended issue.
6. The names and addresses of the vendors of property purchased or acquired or proposed to be purchased or acquired by the company, and the amount payable in cash, shares, or debentures to each separate vendor.
7. The amount (if any) paid or payable in cash, shares, or debentures for any such property, specifying the amount (if any) paid or payable for goodwill.
8. The amount (if any) paid or payable as commission for subscribing or agreeing to subscribe or procuring or agreeing to procure subscriptions for any shares or debentures in the company, or the rate of such commission.¹

¹ If this is not ascertained at the time of filing the original Statement, it seems that a further Statement may be filed, verified in like manner, to contain the necessary particulars (see Section 89, Sub-section 1 (b)).

9. The estimated amount of preliminary expenses.
10. The amount paid or intended to be paid to any promoter (naming him) and the consideration for such payment.
11. The date of and parties to every material contract (other than contracts entered into in the ordinary course of the business intended to be carried on by the company or entered into more than two years before the filing of the Statement).
12. The time and place at which such contracts or copies thereof may be inspected.
13. The names and addresses of the auditors of the company (if any).
14. Full particulars of the nature and extent of the interest of every director in the promotion of or in the property to be acquired by the company, or, where the interest of such a director consists in being a partner in a firm the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm, in cash, shares, or otherwise, by any person, either to induce him to become or to qualify him as a director or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company.
15. The nature of the provisions (if any) of the Articles of Association precluding holders of shares or debentures receiving and inspecting balance sheets or reports of the auditors or other reports.¹

It will be seen from the following pages that these are substantially the matters required to be stated in a prospectus, with the omission of some (such as the contents of the Memorandum of Association and the names of the signatories thereto) which will already be found upon the file. In the pages below will be found a discussion of the principal matters involved.

Under Section 72 no person can be appointed a director by the Articles or named as a director in the Statement unless before the registration of the Articles or the filing of the Statement he has signed and filed a Consent in writing to act as a director, and either signed the Memorandum for a number of shares not less than his qualification (if any) or signed and filed a contract in writing to take from the company and pay for his qualification

¹ By Section 114 holders of preference shares and debentures have the same right to inspect the balance sheets and reports of auditors and other reports as is possessed by ordinary shareholders. Any provision to the contrary would be invalid.

shares. Under Section 85 a company must not proceed to allotment unless the minimum subscription, as named in the Statement (or, if no amount is so named, the whole amount of the share capital, other than that issued or agreed to be issued as fully or partly paid up otherwise than in cash), has been subscribed for and an amount not less than five per cent. of the nominal amount of each share payable in cash has been paid to and received by the company (see page 175, *infra*), and cannot (Section 87) commence business or exercise any borrowing powers until the minimum subscription (consisting of shares payable in cash) has been allotted, and there has been filed with the Registrar a Statement in Lieu of Prospectus. For other necessary preliminaries see page 168, *infra*. Under Section 83 the company cannot prior to the statutory meeting vary the terms of a contract referred to in the Statement except subject to the approval of the statutory meeting.

A private company is excepted from the provisions of Sections 72, 85, and 87. Companies which have made an allotment of shares or debentures before the 1st July, 1908, are excepted from Sub-section 7 of Section 85.

The object of the Statement in Lieu of Prospectus is to give publicity in the case of "prospectusless" companies to the essential matters of their constitution. But it allows the Statement to be filed at any time before allotment, and promoters frequently adopt the practice of filing the Statement at the same time as or immediately after the Memorandum, in which case they can truthfully state in regard to many of the particulars required that nothing has been done, although before the issue of the shares or debentures many of the things referred to may happen. In cases of an early filing of the Statement a question will arise as to what is meant by the words "proposed to be purchased or acquired by the company" in the sixth head of the form of Statement. It will clearly include anything indicated in the Memorandum or Articles as one of the objects of the company: e.g. if it is stated that the company is formed to acquire the business of Messrs. A and B, that will be a property proposed to be acquired, and A and B will no doubt be the vendors; but if no contract has been made it is not clear that any amount can be said to be "payable to each separate vendor"; and if the Memorandum and Articles do not refer to any property, and the directors have not yet taken into consideration any proposed purchase, there is more difficulty in saying what property is proposed to be purchased or who are the vendors. Again, how is the amount "intended to be paid to any promoter" to be fixed before there is an agreement with him? An accurate statement

is not possible unless the company, acting through its directors sitting as a board, has formed an intention of paying the promoter some specific sum. Where it appeared from the Memorandum and Articles that a company was formed for the purpose of entering into an agreement for the acquisition of certain property, it was held by the Court of Appeal that to fill up the seventh head of the Statement with the words "no amount yet payable" was not a proper compliance with the Act.¹

If false statements are found in a prospectus, the directors and other persons responsible for the issue of the prospectus are liable in damages to the persons taking shares on the faith of the statements. And if a person applies for shares upon the faith of the Statement, that Statement becomes the basis of the contract between him and the company. If the document contains a false statement, he may have a right to rescind.² A person who had not seen the statements before he took the shares, or who did not rely on them in taking the shares, would have no remedy. But a man who had consulted the file before applying for shares might argue, "The directors had a statutory duty to make and file true statements, but they failed in that duty, whereby I suffered loss, and, being one of the class for whose benefit the enactment was made, I have an action on the case against the directors"; and this argument might prevail.

If no Statement in Lieu of Prospectus is filed it seems that any allotment of shares or debentures is void, being prohibited by Section 82,³ but if a statement purporting to comply with the Act which is not merely illusory is filed the allotments are not invalid, although the statement does not comply with all the requirements of the Act.⁴

The Schedule to the Act of 1907 had a form for a statutory declaration verifying the Statement in Lieu of Prospectus, but this is now omitted, and no words in the Statute require such a declaration. Persons wilfully making false statements will be punishable under Section 281, which makes a statement false in any material particular knowingly made in a document required for the purposes of the provisions of the Act specified in the Fifth Schedule (including Section 82) a misdemeanour punishable by imprisonment, with or without hard labour, for a term not exceeding two years, and on summary conviction to imprisonment for a term not exceeding four months, with or without hard labour, and in either case by fine in lieu of or in addition to imprisonment.

¹ Blair Open Hearth Furnace Co., [1914] 1 Ch. 390.

² *Ibid.*, per Warrington J., at page 401.

³ Blair Open Hearth Furnace Co., [1914] 1 Ch. 390; Jubilee Cotton Mills, *in re*, [1923] 1 Ch. 1

⁴ Blair Open Hearth Furnace Co., *supra*.

PROSPECTUSES.

The most important practical matter connected with the formation of a company is the obtaining of capital, and, except in the case of converting private businesses into companies, and in a few cases where money is privately subscribed, this is done by means of a "Prospectus."

Prior to 1900 the legislative enactments relative to the prospectus were very few, the principal being Section 38 of the Act of 1867 (now repealed and not re-enacted), which required a statement to be inserted specifying the dates and names of the parties to (but not the contents of) any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of the prospectus; and The Directors' Liability Act, 1890, which dealt with the effect of misstatements and not with the contents of the prospectus. The Act of 1900 (Sections 9 and 10), however, contained stringent provisions as to the prospectus, which as from the 1st July, 1908, were amended by Section 2 of the Act of 1907, and are now replaced by Sections 80 and 81 of the Consolidation Act.

Definition of "Prospectus" in the Act.—By Section 285 of the Act of 1908 a prospectus is defined as "any prospectus, notice, circular, advertisement, or other invitation offering to the public for subscription or purchase any shares or debentures of a company." This definition applies "unless the context otherwise requires," and at first sight would seem to exclude the case of shares or debentures offered to a limited class of persons, such as only to the members of a particular company.¹ But this cannot be affirmed with certainty; for in Section 81, which contains the main provisions relating to the prospectus, there is this sub-section (7): "This section shall not apply to a circular or notice inviting existing members or debenture holders of a company to subscribe either for shares or for debentures of the company, whether with or without the right to renounce in favour of other persons; but, subject as aforesaid, this section shall apply to any prospectus, whether issued on or with reference to the formation of a company or subsequently." The words of exclusion seem wholly unnecessary unless the word "prospectus" applies to an offer of shares to the members of the company only. On the other hand, if the present members of the company issuing the prospectus are "the public," it is difficult to see what class of persons may not also be held to be "the public," and how any prospectus can be other than an

¹ Booth v. New Afrikander Gold Mining Co., [1903] 1 Ch. 295.

invitation offering shares or debentures to the public. However, in the view of the Board of Trade a circular or notice to members or debenture holders is not, unless they have the right to renounce in favour of other persons, an offer to the public. Therefore, under the directions of the Board of Trade the Registrar will not receive and file as a prospectus a circular or notice to members or debenture holders which gives no right to renounce.

It appears from a Scotch case that a circular placed in the hands of friends of the proposed directors, even to the number of forty and intended to be shown to their friends, is not an invitation to the public¹ Warrington, J., has also held that the printing of one thousand copies of a prospectus, and the circulation of over two hundred of them by the directors and promoter amongst their friends, is not such an invitation; holding further that the offer of the shares, to fall within the section, must be by the company, and must be an offer to any person who chose to come in and take them.² It is not possible to say with confidence what number of persons will constitute a "public." All the circumstances must be considered in each case.

In the case of a reconstruction, a circular offering shares of the new company to the members of the old company would seem not to be a prospectus within the meaning of the Act.³

It will be observed that the definition includes a prospectus offering the public shares for *purchase*, so that even where the capital has been taken up, if the holders publish a document offering the shares for sale to the public, the document will be a prospectus. It should be observed that Section 80 only applies to prospectuses issued by or on behalf of the company or in relation to an intended company; Section 81 only to those issued by or on behalf of a company, or by or on behalf of any person who is or has been engaged or interested in the formation of the company; and Section 84 (Directors' Liability) to a prospectus inviting persons to *subscribe* for shares or debentures; and Section 85 to an offer of share capital by the company.²

Prospectus to be Dated and Filed (Section 80).—Every prospectus issued by or on behalf of a company or in relation to any intended company must be dated, and such date, unless the contrary is proved, is to be taken as the date of publication of the prospectus. Before the date of publication a copy of the prospectus must be signed by every person named as a director or proposed director, or by his

¹ *Sleigh v. Glasgow and Transvaal Options*, [1904] Court of Sess., 6 F. 420.

² *Sherwell v. Combined Incandescent Mantles Syndicate*, [1907] W. N. 110, 23 T. L. R. 482.

³ *Booth v. New Afrikaner Gold Mining Co.*, [1903] 1 Ch. 295.

agent authorised in writing, and filed with the Registrar. Until so filed the prospectus must not be issued, and when issued it must bear on the face of it a statement that it has been filed with him. The Registrar is forbidden to register any prospectus unless it is dated and signed as above mentioned. The Registrar's practice is to require every prospectus presented for registration to be printed, in order that it may correspond exactly with the copies issued to the public. When a prospectus is presented for filing it is examined by the officials at the Registry and provisionally accepted if it appears to be in order. Two or three days later the prospectus undergoes a further official scrutiny, after passing which it is placed on the file relating to the company, although the filing is regarded as having been effected on the day of presentation. It is not safe to proceed with the printing or publication of a prospectus before it has passed the second examination, as until then there is always a possibility that the copy lodged with the Registrar may be handed back by him owing to some irregularity being discovered therein or other cause. The Registrar's examination is intended to ensure the observance of certain formalities, and the fact that a prospectus has been accepted by him must not be understood to imply that the document is generally in order, or even that the specific requirements of the Act have been complied with. If a prospectus is issued before filing, the company and every person knowingly a party to the default will be liable to a fine of five pounds a day from the date of the issue to the date on which the filing is effected.

By Section 72, no person, except in the case of a private company, is capable of being appointed a director by the Articles, or may be named in any prospectus issued within a year from the date at which it is entitled to commence business, or in the statement in lieu of prospectus, as a director or proposed director, unless he has first signed (by himself or his agent authorised in writing), and filed with the Registrar, a consent in writing to act, and has agreed to take his qualification shares from the company, either by subscribing the Memorandum for at least the prescribed number, or by signing and filing with the Registrar a contract in writing to that effect.¹

The prospectus of an intended company may be placed upon the file by the Registrar before the registration of the company, if accompanied by the prescribed form signed by the persons who have consented to act as directors and a contract by them to take their qualification shares from the company; but such registration does not secure a right or title to the proposed name, and the

¹ See page 36, *supra*.

papers of any other company may be brought in and the company incorporated with an identical name after the filing of the intended company's prospectus, and thus prevent the intended company from adopting the name appearing in the prospectus. Registration of the prospectus before the incorporation of the company is sometimes resorted to in order that the prospectus may be issued to the public, or shares underwritten, before payment of capital duty and registration fees, and the promoters may learn whether it is worth while to proceed further. That course, however, has serious disadvantages, and it must not be forgotten that the Memorandum and Articles of Association must first be prepared and signed; that a copy of the Memorandum must be printed on the prospectus; and that it must be intimated that the company is *intended* to be registered—not that it actually *is* registered.

Contents of Prospectus.—Section 10, Sub-section 1, of the Act of 1900 governed companies up to the 30th June, 1908; but from that date Section 2, Sub-section 1, of the Act of 1907, or Section 81 of the Act of 1908 (which is substantially identical with the Act of 1907), takes its place. In this and the following pages the provisions of the Act of 1900 are referred to in the notes, as the rights of persons who took shares on the faith of prospectuses issued before the 1st July, 1908, will depend on the Act of 1900. Every prospectus (defined as above) issued by or on behalf of a company, or by or on behalf of any person engaged or interested in the formation of the company,¹ must contain the following particulars:—

1. The contents of the Memorandum of Association, including the names, addresses, and descriptions of the signatories, and the number of shares subscribed for by them respectively.
2. The number of founders', management, or deferred² shares (if any) and the nature and extent of the interest of the holders in the property and profits of the company.³ (This will require a statement both of their rights as to dividends and to share in the assets in case of a winding up.)
3. The amount of the directors' share qualification.
4. The provisions in the Articles of Association as to the remuneration of the directors. (To comply with this it will be necessary practically to set out the Article verbatim.)

¹ As a prospectus includes a document offering shares or debentures for sale, financial groups who have taken up blocks of shares and offer them for sale will fall within this section unless they have been wholly independent of the promotion.

² The Act of 1900 did not include "deferred shares."

³ The Act does not define founders' or management shares. As to the common forms of founders' shares see page 32, *supra*. The object of this provision is that subscribers may know how large a share of the profits or assets will go to the holders of those shares.

5. The names, descriptions, and addresses of the directors or proposed directors. (As regards description, it is thought that it will not suffice to say "Director of the A. B. Company, Limited," but that a real description must be given. As regards address, it has been held, under a rule of the Supreme Court requiring a plaintiff to give his address, that this means his residence, and that his place of business is not sufficient.¹)
6. The minimum subscription on which the directors may proceed to allotment, and the amount payable on application² and allotment on each share; and in case of a second or subsequent offer of shares, the amount offered for subscription on each previous allotment made within the two preceding years,³ the amount actually allotted, and the amount (if any) paid on such shares.
7. The number and amount of shares or debentures issued or agreed to be issued within the two preceding years as fully or partly paid up otherwise than in cash, the extent to which they are paid up, and the consideration for such issue.⁴
8. The names and addresses of the vendors of any property purchased or acquired, or proposed so to be, which is to be paid for out of the proceeds of the issue, or whereof the purchase has not been completed at the date of the prospectus, and the amount payable in cash, shares, or debentures to the vendor, or if there is more than one separate vendor, or the company is a sub-purchaser, the amount payable to each vendor: provided that where the vendors are a firm they are not to be treated as separate vendors.⁵ (This is a very important enactment, and will be considered below: see page 129, *infra*.)
9. The amount paid or payable as purchase money for any such property in cash, shares, or debentures, "specifying the amount (if any) payable for goodwill." (Prior to 1901 it was the common practice to state in the prospectus the purchase price in a lump sum, thus concealing what was to be paid for goodwill, which was often a very large

¹ *Story v. Rees*, [1890] 21 Q. B. D. 748, 59 L. J. Q. B. 310.

² "The amount payable on application on each share shall not be less than five per cent. of the nominal amount of the share" (Section 85, Sub-section 3).

³ The Act of 1900 did not include the limitation "made within the two preceding years."

⁴ The Act of 1900 also omitted the limitation "within the two preceding years."

⁵ The Act of 1900 did not contain this proviso. It gets rid of an objection often felt by vendors against disclosing the terms of their partnership.

amount. That course is now illegal where goodwill forms part of the property to be acquired, as the price to be paid for it must be disclosed.)

10. The amount (if any) paid within the two preceding years, or payable, as underwriting commission on *shares or debentures*, or the rate of such commission,¹ but so that it is not necessary to disclose the amount payable to sub-underwriters.² (See page 158, *infra*. As there is the alternative of stating the amount or rate,³ it would seem not to be necessary to state the number of shares underwritten. It should be noted that under the Act of 1900 it was not necessary to state the underwriting commission, if any, on debentures; but the Acts of 1907 and 1908 require this also to be stated.)
11. The amount or estimated amount of preliminary expenses (see page 164, *infra*).
12. The amount paid within the two preceding years⁴ or intended to be paid to any promoter, and the consideration for any such payment. (Many persons think that if this Act succeeds in preventing promoters from adding to the purchase consideration large profits for themselves, they will revert to requiring payment of a lump sum in cash for their services.)
13. The dates of and parties to every material contract, and a reasonable time and place at which any material contract, or a copy thereof, may be inspected. But there is an exception in the case of contracts entered into in the ordinary course of the business carried on or intended to be carried on by the company, and of contracts made more than two⁵ years before the date of the prospectus. (This most important provision is considered below: see page 130, *infra*.)
14. The names and addresses of the auditors (if any).
15. Full particulars of the nature and extent of the interest (if any) of every director in the promotion of, or in the

¹ The Act of 1900 did not include the limitation "within the two preceding years," and did not require the disclosure of the commission paid or payable for placing debentures.

² The Act of 1900 did not make this exception.

³ The rate only must not be stated if the agreement is to pay a lump sum (*Booth v. New Afrikaander Gold Mining Co.*, [1903] 1 Ch. 295).

⁴ The Act of 1900 did not contain the words "within the two preceding years."

⁵ In the Act of 1900 the period was three years.

property proposed to be acquired by, the company,¹ or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares or otherwise¹ by any person either to induce him to become, or to qualify him as, a director, or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company.

16. Where the company is a company having shares of more than one class, the right of voting at meetings of the company conferred by the several classes of shares respectively.²

Several of the above matters require further consideration, which here follows.

Disclosure as to the Vendors and the Purchase Price (Section 81, Sub-section 1 (f): see Numbers 8 and 9, pages 127 and 128, *supra*).—A common practice has been for the owners of a business or property to agree to sell it to a nominee of the promoters, who agrees to resell to the company at a profit, often very large, which the promoters receive and retain. In the case of mines, concessions, patents, and other property of uncertain value, sometimes several intermediaries are found. The prospector may agree to sell his mine to a speculator for a few hundred pounds and a tenth of the capital of any company to be formed to purchase. The speculator "brings the mine to England," and agrees to sell it to financiers for a few thousand pounds and sufficient shares to make the price equal to one third of the capital of the company. The financiers make the purchase in the name of a nominee, promote the company, and agree to sell the mine for sufficient cash to pay all their outgoings and as many shares as make up two thirds of the capital of the company. The public subscribe for the shares necessary to provide the cash before mentioned and more or less working capital; and experience since the Act of 1900 came into operation shows that they continued to do so, at least in the case of mines and oil properties, although they may have known that the original vendor had been content to sell his property for a few hundred pounds and a small portion of the capital, while the company perhaps paid many thousand pounds in cash and two thirds of its share capital.

¹ The Act of 1900 did not contain the provision relating to the case of a director being a partner in a firm, and only required a statement of the amount payable to directors in cash or shares, omitting the words "or otherwise."

² This requirement was not contained in the Act of 1900.

The Act now requires the disclosure in the prospectus of the names and addresses of all the vendors and sub-vendors, and the amount *each* person is to receive, whether in cash, shares, or debentures. For the purposes of this requirement the word "vendor" includes, as well as the immediate vendor to the company, every person who has entered into a contract, absolute or conditional, for the sale or purchase or for any option of purchase of any property to be acquired by the company, where either the purchase money is not fully paid before the publication of the prospectus, or the purchase money is to be paid wholly or in part out of the proceeds of the issue offered for subscription by the prospectus, or the contract depends for its validity or fulfilment on the result of the issue (Section 81, Sub-section 2). But if the vendors or any of them are a firm it is not necessary to distinguish the amounts receivable by the respective partners (Section 81, Sub-section 1 (f)).¹ Where the company purchases the benefit of an existing contract, it will be necessary to state both the price paid for such benefit and the price payable under the contract.² In other words, the only way of escaping the obligation to disclose particulars of any purchase is to complete the purchase, and pay the whole purchase consideration, before the publication of the prospectus, in which case this particular portion of the Statute will not apply²; but, although the contents of the contract need not be stated in such a case, the obligation to disclose all material contracts will usually render it necessary to give the date of and parties to the contract, and provide a reasonable time and place where it may be seen.

"Where any of the property to be acquired by the company is to be taken on lease" the word "vendor" includes "lessor," and the words "purchase money" include the consideration for the lease (Section 81, Sub-section 3). It is not clear whether the words "is to be taken on lease" include the case of the company purchasing an existing lease. In common parlance certainly the words would not have that meaning; but if they have not, the object of the Act might be defeated by the original vendor granting a long lease of the property to the vendor to the company, who could sell the lease to the company without being subject to the obligation to make disclosure of the price paid by him for the lease.

Disclosure of Material Contracts (Section 81, Sub-section 1 (k): see Number 13, page 128, *supra*).—Section 38 of The Companies Act, 1867, required the disclosure of the date of and parties to

¹ This exception was not found in the Act of 1900.

² *Brookes v Hansen*, [1906] 2 Ch. 129.

"any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue" of the prospectus; but the Courts held that this section only applied to contracts affecting the company which were material to be known to subscribers. The Acts of 1900, 1907, and 1908 are in some respects even more vague. They deal with "every material contract" without specifying between whom or for what purpose it must be material to fall within the scope of the Act. For instance, a contract between rivals in trade of the new company to prevent it from obtaining business would be very material, but can hardly be within the meaning of the Act. It is submitted that the contracts must be those to which the company or some persons having direct relations with the company (such as vendors, promoters, directors, or officers) are parties, and that a material contract is one "which, upon a reasonable construction of its purport and effect, would assist a person in determining whether he would become a shareholder in the company,"¹ or one which is "calculated to influence persons reading a company's prospectus in making up their minds whether or not they will apply for shares"²; or that (to adopt the summary of the cases on the old law in Lord Wrenbury's "Companies Acts," 10th edition, page 186) "the prospectus had to disclose, not only contracts which imposed an obligation on the company, but also all contracts . . . which relate to the affairs of the company, or its promoters, vendors, directors, and officers, and which are material for an intending applicant to know."

Under the Act of 1867 an oral contract was held to be within the section,³ but that Act did not contain any provision that a time and place must be stated at which the contract or a copy may be inspected.

While the Act of 1900 was in the form of a Bill there were proposals that it should be necessary to state the effect of every material contract. Those proposals have not been embodied in any of the Acts, but instead it is necessary to state a reasonable time and place where the contracts or copies may be inspected; but it is not stated that the company or the promoters must produce the contracts or copies to any applicant. If production is refused, the remedy of the applicant for production is therefore not to subscribe for shares. It is possible, however, that disputes may arise between the financial editors of newspapers and promoters as to whether the former have a right to see the contracts. It is

¹ This was the test applied to the former Act by Baggallay, J. J., in *Sullivan v. Mitcalfe*, [1880] 5 C. P. D. 465.

² *Per Coleridge, L. C. J., Grove and Lindley, JJ.*, in *Twycross v. Grant*, [1877] 2 C. P. D. 485, on the Act of 1867.

³ *Capel v. Sim's Ships Compositions Co.*, [1888] 58 L. T. 807, 57 L. J. Ch. 713.

presumed that "reasonable time" means a reasonable time of day sufficiently long before the closing of the list of subscriptions to enable the effect of the contracts to be considered; and "reasonable place" means a place easy of access, having regard to the situation of the company's head office or place of business. It probably does not have any reference to the places to which the prospectus is sent: e.g. a resident in Scotland to whom a prospectus of an English company is sent will, it is thought, have no claim to have the contracts produced for inspection in Scotland.

The contracts which are excepted from the provisions of the Acts are—

1. Contracts entered into in the ordinary course of the business carried on or intended to be carried on by the company. Presumably the words "intended to be carried on" refer to the case where the company is formed to purchase an existing business, when contracts made in the ordinary course of that business need not be disclosed.
2. Under the Act of 1900 contracts made more than three years, or under the Acts of 1907 and 1908 more than two years, before the publication of the prospectus.
3. In the case of a prospectus published more than one year after the date at which the company is entitled to commence business, contracts made more than two years before the publication of the prospectus.

Disclosure of the Interest of Directors (Section 81, Sub-section 1 (*n*)): see Number 15, pages 128–129, *supra*).—At Common Law a director could not take a secret profit from his company; but if there were independent directors, disclosure to them was a sufficient disclosure to the company. Under the Acts there must be an express statement in the prospectus, not only of the nature but of the extent of every director's interest in the promotion and in the property proposed to be acquired by the company,¹ and a statement must also be made of all sums paid or agreed to be paid to him in cash or shares or otherwise,² either to induce him to become a director or to qualify him, or otherwise for services rendered by him in connection with the promotion or formation of the company. The section was no doubt in part the outcome of the facts disclosed by E. T. Hooley's bankruptcy in relation to

¹ The Act does not require in terms disclosure of the director's interest in any property which *has been* acquired by the company.

² The Act of 1900 did not contain the words "or otherwise," or the words "to induce him to become a director."

payments made to directors bearing well-known names, being the price paid for the use of their names. These sums will fall within the Acts of 1907 and 1908, though they possibly escaped that of 1900. All Common Law liabilities remain unaffected by the Act, and directors will be liable for secret profits made by them out of their office, whether such profits fall within the words of the Act or not.

Restrictions on the Generality of Section 81.—These are as follows :—

1. The section does not apply to a circular or notice inviting existing members or debenture holders of a company to subscribe for shares or debentures of the company (Section 81, Sub-section 7).¹
2. If the prospectus is published more than one year after the date at which the company is entitled to commence business, the requirements above numbered, 1, as to Memorandum of Association; 3, qualification of directors; 4, remuneration of directors; 5, names, addresses, &c., of directors; 11, amount of preliminary expenses; and 15, interest of directors, do not apply (Section 81, Sub-section 8).²
3. If the prospectus is published as a newspaper advertisement, it is not necessary to specify the contents of the Memorandum of Association or the signatories thereto, or the number of shares subscribed for by them (Section 81, Sub-section 5).

Except as above, the section applies to all prospectuses, whether issued on or with reference to the formation of a company or subsequently.

No "Waiver" of the Obligations of Section 81.—As is well known, promoters for many years sought to diminish the effect of Section 38 of the Act of 1867 by the insertion of a clause by which applicants for shares were required to waive their rights under the Act. That practice is forbidden now. "Any condition requiring or binding any applicant for shares or debentures to waive compliance with any requirement of this section, or purporting to affect him with notice of any contract, document, or matter not specifically referred to in the prospectus, shall be void" (Section 81, Sub-section 4).

¹ The section makes it clear that this will include the case of an existing shareholder applying for debentures, or an existing debenture holder applying for shares, and allows of the shareholders or debenture holders renouncing in favour of other persons.

² In cases governed by the Act of 1900 the obligation to disclose material contracts is limited in ordinary cases to three years; but in the case of prospectuses published more than a year after the time at which the company is entitled to commence business to two years.

Effect of Non-Compliance with Section 81.—The Act contains no provision as to the results to follow from failure to specify in the prospectus the various matters and things directed to be included. In the Act of 1867 failure to specify the proper contracts rendered the prospectus "fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same," with the result that a person induced to take shares which he would not have taken had he known of the contracts could recover damages from them; but there is no similar provision in the Act of 1908, and the Act does not in express terms impose any liability either on the company or the promoters or directors for failing to comply with its provisions.

It has been held that the omission will not give an allottee a right to rescission of the contract to take shares,¹ but may in some cases give a right to damages against directors; to establish such a right, however, it will be necessary to prove more than the mere omission of one or more of the required particulars.² The right (if any) to damages will be based upon the fact that there are omissions from the prospectus of matters which there was a duty to disclose, whereby such omissions become equivalent to misstatements, or upon the fact that a failure to perform a statutory duty gives a cause of action to the persons injured; but in either case the person seeking relief must show damage.³ It will therefore be necessary for the complaining party to show that his loss has arisen as a natural result of the defendant's default in complying with his statutory duty. It would seem that, at least, he must satisfy the Court that if the proper statements had been contained in the prospectus he would not have taken his shares.⁴

That it was intended that non-compliance with the section should impose a liability is clear from Sub-section 6, which purports to restrict the liability as follows:—"In the event of

¹ *South of England Natural Gas Co.*, [1911] 1 Ch. 573. "His remedy is against the directors and other persons responsible for the prospectus" (*per* Swinfen Eady, J., at page 577). See page 153, *infra*.

² *Wimbledon Olympia, Limited*, [1910] 1 Ch. 630.

³ The law of liability for breach of statutory duty is thus stated by Fletcher Moulton, L. J. "If by a Statute a duty is laid on any person, every member of the public has a right to have that duty performed. The breach of it does not give every member of the public a right of action, because damage is an essential part of such cause of action, but it is settled law that where damage has accrued to any person through breach of a statutory duty by another person the latter is liable" (*David v. Britannic Merthyr Coal Co.*, [1909] 2 K. B. at page 157; see also *Groves v. Lord Wainborne*, [1908] 2 Q. B. at pages 412, 413, from which it appears that only some person belonging to the class for whose benefit or protection the Statute imposes the duty can claim relief).

⁴ Compare *Nash v. Galthorpe*, [1905] 2 Ch. 237; *Macleay v. Tait*, [1900] App. Cas. 24, decided on the Act of 1867.

non-compliance with any of the requirements of this section, a director or other person responsible for the prospectus shall not incur any liability by reason of the non-compliance, if he proves that—(a) as regards any matter not disclosed, he was not cognisant thereof; or (b) the non-compliance arose from an honest mistake of fact on his part"¹—the burden of proof of ignorance or mistake being therefore on the director. By a proviso to the sub-section, however, the burden of proof of knowledge in the case of non-disclosure of the interest of a director in the promotion or property to be acquired falls on the plaintiff, and not on the person charged.

Sub-section 9 of Section 81 provides that nothing in the section shall limit or diminish any liability which any person may incur under the general law apart from that section.

The general law as to prospectuses, apart from the Acts of 1900, 1907, and 1908, therefore remains unchanged.

As before mentioned, the word "prospectus" in the Acts of 1900, 1907, and 1908 only applies to cases where shares or debentures are offered to the public for subscription or purchase: therefore in the case of a prospectus not making an offer to the public the only obligation to make any disclosure of contracts² is that involved in the duty not to mislead, and it seems that a document containing particulars of the company, accompanied by a letter advising the recipient to apply for shares, issued by intending directors, may not constitute an invitation to take shares.³

The prospectus is an invitation to the persons to whom it is addressed to become shareholders or to take up debentures of the company, and accordingly must be drawn with great care, so that it shall not contain any misstatement of fact. The effect of misrepresentation is considered elsewhere (see page 137 *et seq.*, *infra*).

The following things should be clearly set out in every prospectus, although as regards some of them there is no statutory obligation to do so: viz.—

The name of the company in full.⁴

The total amount of the share capital.

The nominal amount of the shares.

¹ "That is equivalent to saying that he is liable if he cannot prove" these things (*per* Swinfen Eady, J., in *South of England Natural Gas Co.*, [1911] 1 Ch. at page 577).

² The Statement in Lieu of Prospectus must, however, contain particulars of the material contracts.

³ *Sleigh v. Glasgow and Transvaal Options*, [1904] Court of Sess., 6 F. 420.

⁴ In the case of a prospectus of a foreign or colonial company there should be a statement of the country in which the company is incorporated. If the word "Limited" forms part of the name this is obligatory (Section 274).

payment.¹ But it must be noted that only the shareholder who applied for the shares on the faith of the prospectus is entitled to relief; the remedy does not extend to a purchaser from another shareholder who is not a party to the misrepresentation.²

The only right of an aggrieved party as against the company is for a rescission of his contract to take shares, and to be restored to the same position he was in before: he cannot, as against the company, retain his shares and claim damages³; but the relief may be claimed after the shares in question have been forfeited for nonpayment of calls, and in such a case promptitude in seeking relief is not of the same importance, for he is then only a debtor to the company.⁴ Where, however, the forfeiture is not complete, the Court will restrain the company from forfeiting the shares until the hearing of the action for rescission, usually requiring the plaintiff to pay into court the amount of the calls.⁵

Rescission of the contract to take shares can be obtained by an Order made either before or after the liquidation⁶ if the shareholder is able to show—

- (A) That a misstatement was made by or on behalf of the company.
- (B) That it was a material one.
- (C) That he relied upon it in taking the shares.⁷
- (D) That he commenced proceedings before liquidation and within a reasonable time.

But he need not show that the statement was made fraudulently, or was known to the directors to be untrue.⁸ If the statement is contained in a report set out in the prospectus, the company is responsible if the report was fraudulent on the part of some agent of the company making it, and, it seems also, if untrue in fact, although made in good faith by all parties concerned, unless the company shows clearly that it does not vouch for the truth of the statements⁹; the distinction is between showing that it is

¹ *Karberg's Case*, [1892] 3 Ch. 1.

² See page 118, *infra*.

³ *Houldsworth v. City of Glasgow Bank*, [1880] 5 App. Ca. 317.

⁴ *Aaron's Reefs v. Twiss*, [1896] App. Ca. 273.

⁵ *Lamb v. Sambas Rubber Co.*, [1908] 1 Ch. 845, *Jones v. Pucaya Rubber Co.*, [1911] 1 Q. B. 455; *Buckley, L. J.*, reserved his judgment as to whether it was essential that the plaintiff should bring the amount into court.

⁶ *Reese River Silver Mining Co. v. Smith*, [1899] L. R. 4 H. L. at page 75.

⁷ For instance, an underwriter who took shares relying only on the names of the Directors cannot obtain relief on the ground of defects in the prospectus (*Baty v. Keswick*, [1901] 85 L. T. 18). He must be prepared to put his finger on the misstatement which misled him (*Christineville Rubber Estates*, [1911] W. N. 216, 81 L. J. Ch. 63, 100 L. T. 260).

⁸ *Redgrave v. Hurd*, [1882] 20 Ch. D. 1; *Karberg's Case*, [1892] 3 Ch. at page 13, *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. at page 423.

⁹ *Mair v. Rio Grande Rubber Estates*, [1913] App. Ca. 853.

repeating on hearsay what it has been told, and affirming the matter as a fact.¹ In other words, the report will be treated as the basis of the contract unless the company dissociates itself from the report and warns subscribers that they must take the report for what it is worth.²

Questions often arise as to how far the company is responsible for the misrepresentations actually made. The effect of the authorities has been summed up as follows³:—To establish such responsibility it must be shown that the representations were either (1) made by the directors or general agents of the company; or (2) made by a special agent of the company acting within the scope of his authority,⁴ which includes a person whose acts are subsequently ratified; or (3) known to the directors to have been made at some time before the contract to take shares was complete; or (4) known by the directors to form the basis of the contract; and in each case this rule applies whether the representations were known to be false or not.

From the above it will be seen that representations made even before the company was in existence, or made by persons who are strangers to the company, may become, by the subsequent knowledge of the directors that a prospectus has been shown to the applicant, a ground for rescission of the contract, as where an application for shares was made before the company was incorporated upon the faith of a prospectus prepared by the promoter, and the company adopted the prospectus and allotted the shares.⁵ But a subscriber to the Memorandum cannot get relief, for the company could not have adopted the misrepresentation before he took his shares.⁶

What statements or omissions are sufficient to give a cause of action is considered on page 144 *et seq.*, *infra*.

It is a general principle of law that where a party having a right to rescind his contract, after having knowledge of such right does any act affirming his contract, he cannot afterwards set up his right to avoid the contract⁷: therefore any act by a shareholder recognising his position as a member of the company after knowledge of the misrepresentation, such as by selling or trying to sell the shares,⁸ attending meetings,⁹ signing proxies, paying calls, or accepting

¹ Reese River Silver Mining Co., [1867] 2 Ch. at page 615.

² Karberg's Case, [1892] 3 Ch. 1; Lynde v. Anglo-Italian Hemp Co., [1896] 1 Ch. 178; Pacava Rubber Co., [1911] 1 Ch. 542.

³ Lynde v. Anglo-Italian Hemp Co., [1896] 1 Ch. 178.

⁴ Thus where the directors know that one of their body is obtaining subscriptions for shares, the company is responsible for representations made by him (Holo Manufacturing Co. v. Williamson, [1912] 28 T. L. R. 164).

⁵ Karberg's Case, [1892] 3 Ch. 1; Tamplin's Case, [1892] W. N. 146.

⁶ Lord Lurgan's Case, [1902] 1 Ch. 707.

⁷ Clough v. London and North-Western Railway, [1872] L. R. 7 Ex. 26.

⁸ *Ex parte Briggs*, [1866] 1 Eq. 483. Compare *Crawley's Case*, [1860] 4 Ch. 322.

⁹ *Sharpley v. Louth and East Coast Railway*, [1876] 2 Ch. D. 603.

dividends,¹ will prevent the member from obtaining rescission, even though done under a mistake as to rights,² unless he have meanwhile definitely elected to rescind the contract, as by commencing proceedings.³

The shareholder must, moreover, come within a reasonable time after learning the truth; for the rights and interests of other persons intervene, and the aggrieved shareholder will not be allowed to wait and see whether the speculation turns out a favourable one, and then, according to the result, retain the benefit or repudiate the loss.⁴ As the intervention of the rights of others prevents the right of the applicant to rescind, it may well be that even a charge on the uncalled capital in favour of debenture holders will prevent relief, but this has not been definitely decided.⁵ The occurrence of a winding up, whether the assets are sufficient to pay the creditors or not, brings in other rights (*i.e.* those of the creditors or contributories) so as to render rescission impossible.⁶

"Where a person has contracted to take shares in a company and his name has been placed on the Register, it has always been held that he must exercise his right of repudiation with extreme promptness after the discovery of the fraud or misrepresentation."⁷ What is a reasonable time is a question of fact, and will vary with the circumstances of each case, but in practice a shareholder should not delay at all after he knows the facts which entitle him to relief. "The delay of a fortnight in repudiating the shares," said Baggallay, L. J.,⁸ "makes it to my mind doubtful whether the repudiation in the case of a going concern would have been in time. No doubt where investigation is necessary some time must be allowed, as in *Central Railway Co. of Venezuela v. Kisch*.⁹ But where, as in the present case, the shareholder is at once fully informed of the circumstances he ought to lose no time in repudiating." He must also seek relief while the company is a going concern—*i.e.* before a winding up, whether voluntary or compulsory, or before

¹ *Scholey v. Central Railway of Venezuela*, [1868] 9 Eq. 266, *note*.

² *Dunlop Truffault Cycle Co.*, [1897] 66 L. J. Ch. 25, 75 L. T. 385.

³ *Tonlin's Case*, [1898] 1 Ch. 104.

⁴ *Downes v. Ship*, [1868] L. R. 3 H. L. 343; *Houldsworth v. City of Glasgow Bank*, [1880] 5 App. Ca. 317.

⁵ For the principle see *Scottish Petroleum Co.*, [1883] 23 Ch. D. 413; *Tennent v. City of Glasgow Bank*, [1879] 4 App. Ca. 615.

⁶ *Tennent v. City of Glasgow Bank*, [1879] 4 App. Ca. 615; *Burgess's Case*, [1880] 15 Ch. D. 507, this being the case of a solvent company.

⁷ *Per Lord Davey in Aaron's Reef v. Twiss*, [1896] App. Ca. at page 294. See also *Sharpley v. Louth and East Coast Railway*, [1876] 2 Ch. D. at page 685.

⁸ *Scottish Petroleum Co.*, [1883] 23 Ch. D. 434. See also *re Christineville Rubber Estates*, [1911] W. N. 216, 81 L. J. Ch. 63, 106 L. T. 260 (four months); *Tate's Case*, [1867] 3 Eq. 795 (a month sufficed).

⁹ [1867] L. R. 2 H. L. 90. In this case two months was allowed, but it was stated that it was necessary that the complainant should come "with the utmost diligence" (*per Lord Romilly* at page 125).

any suspension of business, as by giving notice of insolvency; for upon the commencement of a liquidation the creditors or other shareholders are the persons interested in retaining the name of the shareholder upon the Register, and against them he has no claim to set aside his bargain.¹ It is not enough merely to serve the company with notice of repudiation. The complainant must either procure the company to remove his name from the Register of Members, or commence proceedings to compel it to do so,² subject to the exception, however, that if he has *agreed to be bound* by a test case brought by another shareholder he may await the decision of such case³; or if in an action for calls he has, by his affidavit under Order XIV., set up a counter-claim for rescission, he is in time.⁴ In an action for calls it is not a sufficient defence to set up misrepresentation and repudiation of the shares. The defence must be coupled with a counterclaim for rescission of the contract and rectification of the Register, or, if the action is brought in a Court where such counterclaim cannot be entertained, a statement must be made that relief is being claimed in the proper Court. If the delay has been so long that rescission will not be granted the defence will fail.⁵

The plaintiff must prove the falsity of the representations, and for this purpose frequently relies upon circulars or statements of directors at meetings. It must not be forgotten, however, that the report of an agent to his principal is not evidence against the principal, and unless some more evidence is given or admissions are obtained by interrogatories or otherwise, proof by putting in reports from managers, circulars to shareholders, or prints of speeches made by directors at meetings will not suffice.⁶

An action against the company for rescission and against directors at Common Law for deceit and under the Directors' Liability Act may be combined in one writ.⁷

When an action is brought by a shareholder claiming rescission of his contract to take shares, the Court will restrain the company from forfeiting the shares for nonpayment of calls pending the

¹ Tennent v. Glasgow Bank, [1879] 4 App. Ca. 615, Stone v. City and County Bank, [1878] 3 C. P. D. 282; Onkes v. Turquand, [1867] L. R. 2 H. L. 325; Burgess's Case, [1880] 15 Ch. D. 507, Scottish Petroleum Co., [1883] 23 Ch. D. 413.

² Thomson's Case, [1898] 5 Mans. 282; Scottish Petroleum Co., [1883] 23 Ch. D. 413; First National Reinsurance Co. v. Greenfield, [1921] 2 K. B. 260.

³ Scottish Petroleum Co., [1883] 23 Ch. D. 413, Pawle's Case, [1869] 4 Ch. 497; Hare's Case, [1869] 4 Ch. 503. The pendency of other cases will not save him if there is no agreement to be bound by their result (see cases cited in this note).

⁴ Whiteley's Case, [1900] 1 Ch. 365.

⁵ First National Reinsurance Co. v. Greenfield, [1921] 2 K. B. 260.

⁶ Devala Provident Co., [1883] 22 Ch. D. 593; Djambi (Sumatra) Rubber Estates, [1912] W. N. 192; affirmed in C. A., 29 Times L. R. 28, 107 L. T. 631.

⁷ Frankenburg v. Great Horseless Carriage Co., [1900] 1 Q. B. 504.

decision of the action.¹ Usually the shareholder is required to bring the amount of the calls into court, but whether this is essential is not yet decided.¹

Where a company had discovered that its prospectus was misleading, it was allowed to include in one motion an application to cancel the allotments and return the moneys paid by 1026 persons, a special Order being made as to the procedure.²

It has been held that a subscriber will not be entitled, as against the company, to rescission or damages in case of the omission from the prospectus of particulars required to be inserted under the Acts of 1900 and 1907 or Section 81 of the Act of 1908.³ The case has not been before the Court of Appeal, where it may still be argued that there is at least a right to rescission on the ground that there has been a concealment of a fact which there was a duty to disclose; but in any case this would be so only if the omission was of matters of sufficient importance to materially affect the mind of the subscriber.⁴

2. *A Shareholder's Rights Against the Directors or other Persons who have Issued a False Prospectus.*—Besides the right to rescission of his contract to take shares, the shareholder may also claim damages against the persons who fraudulently induced him to become a shareholder, and this right does not cease when the company goes into liquidation.

Prior to The Directors' Liability Act, 1890, the shareholder's only remedy was by an action for deceit against the persons who fraudulently induced him to take the shares, and this is still the case in regard to companies not formed under the Companies Acts. There is a wide distinction between an action for deceit and an action for rescission of contract. In the latter case it is only necessary to show that the contract was induced by an untrue statement of a material fact, whether made innocently or not⁵; while to sustain an action for deceit it is necessary to show that the directors acted fraudulently—i.e. made the untrue statement either knowing it to be false or without belief in its truth, or recklessly, not caring whether it were true or false,⁶ and liability would attach if the defendant "shut his eyes to the facts or purposely abstained from inquiring into them," but it would not be enough to show that the statement was made

¹ *Jones v. Pacya Rubber Co.*, [1911] 1 K. B. 455, *Lamb v. Samlous Co.*, [1908] 1 Ch. 845.

² *London Electrobus Co.*, [1906] W. N. 147.

³ *South of England Natural Gas Co.*, [1911] 1 Ch. 573, *per* Swinfen Eady, J.

⁴ This was held in a case where the plaintiff was seeking damages against directors (*Wimbledon Olympic, Limited*, [1910] 1 Ch. 639).

⁵ *Karberg's Case*, [1892] 3 Ch. at page 13; *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. at page 423.

⁶ *Derry v. Peck*, [1889] 14 App. Ca. 337, 374.

through want of care.¹ Under The Directors' Liability Act, 1890, now re-enacted as Section 84 of the Act of 1908, in the case of companies formed under the Companies Acts, if the complaining shareholder shows that the statement is untrue, the directors of the company are liable, unless they show that they had reasonable grounds to believe, and in fact believed, the statement to be true (see page 149, *infra*).

To obtain damages from the directors or promoters of a company formed under the Companies Acts, therefore, an aggrieved shareholder may bring an action after the company is in liquidation; but he must allege and show²—

- (A) That a misstatement was made by the persons sought to be charged³ with the intention that it should be acted upon.⁴
- (B) That it was a material one.
- (C) That he was induced by the misstatement to take the shares.
- (D) That he has suffered damage; for "fraud without damage, or damage without fraud, gives no cause for action; but where these two concur an action lies."⁵
- (E) But if the persons charged prove that they believed the statements to be true, and had reasonable grounds for such belief, the action will fail.⁶

"In an action of deceit," says Lord Selborne, "it is the duty of the plaintiff to establish two things: first, actual fraud, . . . and; secondly, he must establish that this fraud was an inducing

¹ Derry v. Peek, [1889] 14 App. Ca. at pages 375 and 376; Angus v. Clifford, [1891] 2 Ch. 440.

² "Fraud must be distinctly alleged and as distinctly proved. . . . It is not allowable to leave fraud to be inferred from the facts", but "an allegation that the defendant made to the plaintiff representations on which he intended the plaintiff to act which were untrue and known to the defendant to be untrue is sufficient" (Davy v. Garrett, [1878] 7 Ch. D. 489, *per* Thesiger, L. J.) "The cases . . . teach me that, above all, in cases of fraud the decision of the Court must proceed *secundum allegata et probata*" (*per* Fry, J., Cargill v. Bower, [1878] 10 Ch. D. at page 516).

³ But see page 147, *infra*, where it will appear that directors who have taken no part in the issue of the prospectus may be liable under The Directors' Liability Act, 1890, or Section 84, and a director who had not seen the prospectus before its issue to the plaintiff, but subsequently received and circulated office copies, was held liable in an action for deceit (Peek v. Derry in the C. A., [1887] 37 Ch. D. 569, 579, 586).

⁴ See page 146, *infra*.

⁵ Pasley v. Freeman, [1780] 2 Sm. L. C. 64; Smith v. Chadwick, [1884] 9 App. Ca. 195. But in McConnell v. Wright, [1903] 1 Ch. 546, it was laid down that even if no evidence is given that the shares taken were worth less than was given for them, the Court will assume that they would only have been worth the price paid if the statements made had been true, and therefore will direct an inquiry as to damages upon proof of the falsity of material statements. And if the company failed within a short time after the issue of the prospectus, that will be taken as *prima facie* evidence that the shares were not worth par (*per* Lord Lindley in Shephard v. Broome, [1901] App. Ca. 342).

⁶ Derry v. Peek, [1889] 14 App. Ca. 337. The necessity for reasonable grounds for the belief is imposed by Section 84 and is not part of the Common Law.

cause to the contract, for which purpose it must be material and it must have produced in his mind an erroneous belief influencing his conduct."¹ But under Section 84 of the Act of 1908 there must be substituted for "actual fraud" the words "an untrue statement which the directors had no reasonable grounds to believe." Also in a case where directors are making a statement to existing shareholders they have a higher duty to such shareholders than to the general public, and may come under liability for dereliction of that duty in a case falling short of actual fraud,² though it is thought that, having "a reasonable ground" for their belief in the truth of their statements will here also be a protection.

Even under the Common Law the motive with which the statement was made was immaterial, for a man is liable for a false statement knowingly made, even if he have no intent to defraud,³ and under the Act this is equally clear. It is not necessary to show that the false statement was the sole inducing cause if it forms a substantial ground for taking the shares,⁴ and the Courts pay little attention to a cross-examination as to the weight attached by the applicant to each statement, holding that a material misrepresentation likely to induce the application is enough, unless the plaintiff admits that he did not act upon it.⁵ If, however, the Court comes to the conclusion that the particular misrepresentation did not affect the plaintiff's mind, and that he would still have taken the shares if he had known the truth, he will have suffered no damage, and cannot recover. The Court may come to this conclusion either from the plaintiff's answers in cross-examination or from his conduct, or from the nature of the misrepresentation relied upon.⁶

As regards statements that are misleading or ambiguous, the law is that a misleading statement is an untrue statement, and it is not material in what sense the directors intended the words used to be understood if they are in fact untrue or misleading,⁷ and "if with intent to lead the plaintiff to act upon it they put forth a statement which they know may bear two meanings, one of which is false to their knowledge, and thereby the plaintiff, putting that meaning on it, is misled, I do not think they can escape

¹ *Smith v. Chadwick*, [1884] 9 App. Ca. at page 190.

² *Nocton v. Ashburton*, [1914] App. Ca. 332 at pages 955, 956.

³ *Derry v. Peek*, [1889] 14 App. Ca. 337 at page 374, *Smith v. Chadwick*, [1884] 9 App. Ca. at page 20, *Armson v. Smith*, [1889] 41 Ch. D. 337.

⁴ *Edgerton v. Fitzmaurice*, [1885] 29 Ch. D. 150.

⁵ *Per* Lord Halsbury in *Armson v. Smith*, [1889] 41 Ch. D. 348, 300. And see *Smith v. Chadwick*, [1884] 20 Ch. D. 27, 44, 9 App. Ca. 187.

⁶ *Smith v. Chadwick*, [1884] 9 App. Ca. 187, *Maclean v. Tait*, [1906] App. Ca. 24; *Nash v. Calthorpe*, [1905] 2 Ch. 237.

⁷ *Greenwood v. Leathershead Wheel Co.*, [1900] 1 Ch. 421.

by saying he ought to have put the other,"¹ and "if a man uses language which, taken in its natural sense, conveys a wrong impression, he cannot be heard to say he did not intend to deceive."² A man "is answerable for what anyone might reasonably suppose to be the meaning of the words he has used."³ But the plaintiff must prove that he understood the statement in the sense in which it is false.⁴ In considering whether a statement is misleading the prospectus must be considered as a whole, and if its tendency is to deceive there is no need to point out some one or more statements which are absolutely untrue.⁵

If a statement is true at the time it is made, but becomes untrue before the allotment of the shares (*e.g.* if a director named in the prospectus has meanwhile resigned), it will be good ground for rescinding the contract,⁶ but it is doubtful whether this will give a cause of action for deceit against directors.⁷

Either in an action for deceit or in an action for rescission the omission of material facts may amount to a misrepresentation.⁸ Thus the omission of the names of the real vendors and the interpolation of a nominal vendor to conceal the true facts may be sufficient to entitle subscribers to relief⁹; but this rule applies only if the omission renders the prospectus as it stands misleading,¹⁰ or the omissions are (in the words of James, L. J.) "omissions amounting in effect to false statements,"¹¹ or if the omission is of something which there was a duty to disclose. Lord Cairns said: "There must, in my opinion, be some active misstatement of fact, or, at all events, such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false."¹² "There must be something

¹ *Per* Lord Blackburn in *Smith v. Chadwick*, [1884] 9 App. Ca. at page 201.

² *Per* Lindley, L. J., in *Armson v. Smith*, [1889] 41 Ch. D. 372.

³ *Per* Cotton, L. J., in *Arkwright v. Newbold*, [1881] 17 Ch. D. 322.

⁴ *Smith v. Chadwick*, [1882] 20 Ch. D. 45, 73, [1884] 9 App. Ca. 187.

⁵ *Aaron's Reefs v. Twiss*, [1806] App. Ca. 273. See page 117, *infra*.

⁶ *Anderson's Case*, [1881] 17 Ch. D. 373. *Scottish Petroleum Co.*, [1883] 23 Ch. D. 413. This will also be the case if the other directors know that one of the directors is on the point of resigning when they go to allotment (*Kent County Gas Co.*, [1907] 95 L. T. 768).

⁷ *Arkwright v. Newbold*, [1881] 17 Ch. D. at pages 325 and 329; *Brownlie v. Campbell*, [1880] 5 App. Ca. 950.

⁸ *Central Railway Co. of Venezuela v. Kisch*, [1867] L. R. 2 H. L. 99; *Oakes v. Turquand*, [1867] L. R. 2 H. L. 342; *Cackett v. Keswick*, [1902] 2 Ch. 456. It has been suggested that a concealment may be a ground for rescission of the contract to take shares, which would not be sufficient to ground an action of deceit against directors (see *per* Lord Cairns in *Peek v. Gurney*, [1874] L. R. 6 H. L. at page 403), but later cases do not draw the distinction.

⁹ *Components Tube Co. v. Naylor*, [1900] 2 Ir. R. 1.

¹⁰ *McKeown v. Boudard Peveril Gear Co.*, [1896] W. N. 36, 65 L. J. Ch. 735, 74 L. T. 712; *New Brunswick Railway Co. v. Conybeare*, [1862] 9 H. L. C. 711; *Peek v. Gurney*, [1874] L. R. 6 H. L. 403.

¹¹ *Gover's Case*, [1875] 1 Ch. D. at page 180.

¹² *Peek v. Gurney*, [1874] L. R., 6 H. L. 403.

more than mere non-disclosure proved before misrepresentation is established: it must, I think, be shown that the non-disclosure is the non-disclosure of something the disclosure of which would falsify some statement in the prospectus."¹ "In an honest prospectus many facts and circumstances may be lawfully omitted, although some subscribers may be of opinion that these would have been of materiality as influencing the exercise of their judgment."² "There are cases in which, in the absence of active fraud, passive misrepresentation—that is to say, silence as to some fact which it would be material to the one party to know, but which the other is not legally bound to communicate—may involve the one in loss, but in which the party suffering what amounts to a moral but not a legal wrong has no remedy in law"³; and Fry, J., has said, "Where parties are contracting with one another each may, unless there is a duty to disclose, observe silence in regard to facts which he believes would be operative upon the mind of the other,"⁴ and gave, as instances of the duty to disclose, the case where a man has unintentionally made an untrue statement and therefore becomes bound to correct it,⁵ and the case where a statement was true at the time it was made, but the facts have been altered before it was acted upon, in which class falls the case of directors named in the prospectus resigning before allotment. In the words of Lord Campbell, "simple reticence does not amount to legal fraud,"⁶ and in those of Chitty, J., in relation to a claim for specific performance, "the obligation to speak is at the root of the proposition."⁷ So Lord Blackburn said, "Where there is a duty or obligation to speak, and a man, in breach of that duty or obligation, holds his tongue and does not speak, and does not say the thing he is bound to say, if that was done with the intention of inducing the other party to act on the belief that the reason why he did not speak was because he had nothing to say, I should be inclined myself to hold that that was fraud also."⁸

¹ *Per* Eve, J., in *Christineville Rubber Estates*, [1911] W. N. 216, 81 L. J. Ch. 63, 106 L. T. 240.

² *Per* Lord Watson in *Arison's Reefs v. Twiss*, [1896] App. Ca. at page 287. See also *Arison v. Smith*, [1889] 41 Ch. D. 348.

³ *Per* Cockburn, C. J., in *Twycross v. Grant*, [1877] 2 C. P. D. at page 532.

⁴ *Davies v. London and Provincial Co.*, [1878] 8 Ch. D. at page 474.

⁵ See also *per* Lord Blackburn in *Brownlie v. Campbell*, [1880] 5 App. Ca. 950, and *Arison v. Smith*, [1889] 41 Ch. D. 348.

⁶ *Walters v. Morgan*, [1861] 3 De G. F. & J. 718.

⁷ *Turner v. Green*, [1895] 2 Ch. 200. Chitty, J., in this case cited with approval from Fry on Specific Performance the words "mere silence as regards a material fact which the one party is not under an obligation to disclose to the other cannot be a ground for rescission or a defence to specific performance."

⁸ *Brownlie v. Campbell*, [1880] 5 App. Ca. 950, where the duty of correcting a mistake *bonâ fide* made is also insisted upon; and see *Arison v. Smith*, [1889] 41 Ch. D. 348, from which it appears that the correction must be clear.

On the other hand, "if by a number of statements you intentionally give a false impression and induce a person to act upon it, it is not the less false although if one takes each statement by itself there may be a difficulty in showing that any specific statement is untrue"¹; that is, the prospectus must be taken as a whole, "and everybody knows that half a truth is no better than a downright falsehood."²

Whether under the old law or under Section 84, the misstatement must be of an existing fact, and not merely an unduly sanguine expression of hope or an exaggerated view of the advantages the company offers. A general commendation of his wares by a trader is not a false statement, even if too highly coloured. "Anticipation of future results is not a statement of fact."³ "If you are looking to the language as only the language of hope, expectation, and confident belief, that is one thing: but you may use language in such a way as, although in the form of hope and expectation, it may become a representation of existing facts"⁴; and to say that something is expected when in reality it is not expected, or that directors have an intention to do something when they have not, is a misstatement of fact.⁵ And a statement that property has been acquired which has not in fact then been acquired will be ground for an action against directors, even if the property be acquired a few days after the allotment of the shares.⁶

A misrepresentation of law is not a misstatement of fact which will give any remedy against directors.⁷

If a false or misleading statement is made, it is no protection to the defendants to say that the plaintiff had means of ascertaining the truth and was negligent in failing to inspect documents referred to in the prospectus or to make other inquiries, for he is entitled to rely on the statements made to him.⁸

If before allotment the directors discover a mistake in the prospectus, it is fraud to allow applicants to remain under the

¹ *Per* Halsbury, L. C., in *Aaron's Reefs v. Twiss*, [1896] App. Ca. 281. As to ambiguous and misleading statements see page 115, *supra*.

² *Per* Lord Macnaghten in *Gluckstein v. Barnes*, [1900] App. Ca. 250, 251.

³ *Per* Lord Esher, M. R., in *Bentley v. Black*, [1893] 9 T. L. R. 580.

⁴ *Per* Lord Halsbury, L. C., in *Aaron's Reef v. Twiss*, [1896] App. Ca. at page 284.

⁵ *Edginton v. Fitzmaurice*, [1885] 29 Ch. D. 459, *Karberg's Case*, [1892] 3 Ch. at page 11.

⁶ *McConnel v. Wright*, [1903] 1 Ch. 546.

⁷ *Beattie v. Lord Ebury*, [1872] 7 Ch. 777, [1874] L. R. 7 H. L. 102; *Rashdall v. Ford*, [1895] 2 Eq. 750; *Bentley v. Black*, [1893] 9 T. L. R. 580.

⁸ *Reynell v. Sprye*, [1851] 1 De G. M. & G. 600; *Arkwright v. Newbold*, [1881] 17 Ch. D. 310; *Aaron's Reefs v. Twiss*, [1896] App. Ca. 273; *Gluckstein v. Barnes*, [1900] App. Ca. at page 251; *Redgrave v. Hurd*, [1882] 20 Ch. D. 23.

mistaken belief and accept an allotment.¹ It is the duty of the directors to point out the mistake in unambiguous terms, and not merely to send a new prospectus correctly stating the facts. "Assuming a fraud to have been committed, it obviously lies on those who rely upon a subsequent explanation to show that such explanation was quite clear."²

The measure of damages in an action against the directors or promoters is the difference between the actual value (not the market price) of the shares at the time of allotment and the sum paid for them.³ To arrive at an estimate of this actual value all the circumstances of the case must be considered, including the subsequent failure of the company, unless such failure was due to causes which did not exist at the time of allotment. If the company was inherently unsound the shares may have been worth nothing, and then the damages will be the whole nominal value of the shares; and the fact that the shares in the meantime have stood at a premium in the market is no proof of their having had any value.⁴

If the misrepresentation complained of was contained in the prospectus, only original subscribers, and not purchasers of shares, can obtain damages or a rescission of the contract; for the office of the prospectus is exhausted when once the allotment is made,⁵ unless the prospectus was in fact issued with a view of inducing persons to become purchasers of shares, in which case the directors and other persons issuing it with this object will become liable for losses suffered by those who bought shares, even from strangers.⁶ It is not necessary that the representation should be direct to the person injured; it is sufficient if it be made to another (*e.g.* to a newspaper) with the intent that it shall be repeated to and acted upon by the person who is subsequently injured.⁶ "But to bring it within the principle, the injury must be the immediate and not the remote consequence of the representation thus made. . . . It must appear that such false representation was made with the direct intent that it should be acted upon by such third person in the manner which occasions the injury or loss."⁷

¹ *Brownlie v. Campbell*, [1880] 5 App. Ca. at page 950, *Davies v. London and Provincial Co.*, [1878] 8 Ch. D. at page 475.

² *Arnison v. Smith*, [1889] 41 Ch. D. 348; *per* Lord Halsbury at page 370.

³ *Peek v. Derry*, [1888] 37 Ch. D. at page 541; *Arnison v. Smith*, [1889] 41 Ch. D. at page 363.

⁴ *Twycross v. Grant*, [1877] 2 C. P. D. 400, *Peek v. Derry*, [1888] 37 Ch. D. 541.

⁵ *Peek v. Gurney*, [1874] L. R. 6 H. L. 377, 400, 411. A subscriber who has sold his shares and subsequently repurchased them cannot obtain relief (*Croom's Case*, [1873] 16 Eq. 417).

⁶ *Andrews v. Mockford*, [1896] 1 Q. B. 372, *Barry v. Crosskey*, [1861] 2 J. & H. 1.

⁷ Cited from *Barry v. Crosskey* with approval by Lord Cairns in *Peek v. Gurney*, [1874] L. R. 6 H. L. at page 413.

The rights given by The Directors' Liability Act, 1890, and Section 84 of the Consolidation Act require a somewhat fuller statement,¹ and are as follows:—

The directors, promoters, and other persons authorising the issue of a prospectus containing untrue statements are liable for loss to any person subscribing for shares or debentures² on the faith of the prospectus, unless they show that they had reasonable ground for believing, and did believe up to the time of allotment, that the statements were true, or that any statement purporting to be a report or valuation fairly represented or was a fair copy of or extract from the report or valuation (the directors or promoters having reasonable ground to believe that the person who made the report or valuation was competent to make it³), or that any statement purporting to be an official statement was a correct and fair representation or copy of or extract from such document.

The persons liable as above are the actual directors of the company at the time of the issue of the prospectus; the persons who, on their own authority, are named in the prospectus as present or future directors; any promoters who are parties to the preparation of the prospectus or the portion thereof containing the untrue statement⁴; and "every person who has authorised the issue of the prospectus." In the case of *Howell v. Dering* (30th April, 1914), it was sought to make these words apply to brokers who had authorised the appearance of their names on the prospectus, received a fee of £200, and sent a few prospectuses to their own clients. Bailhache, J., however, directed the jury that the words did not point to such persons as bankers, brokers, and auditors whose names appeared on the prospectus, nor to newspaper proprietors who published the prospectus as an advertisement, but was aimed rather at such people as issuing houses, and the jury found that the brokers had not authorised the issue. A case might well arise where the facts would show that the brokers or bankers were the real issuers of the offer of shares or debentures, in which case they would, no doubt, be liable.

¹ There was some doubt whether The Directors' Liability Act, 1890, applied to companies not registered under the Companies Acts. It appears clear that Section 84 only applies to companies so registered (see Section 285).

² Note that this does not extend to subsequent purchasers of shares or debentures. The section is, moreover, limited to cases where the prospectus invites persons to *subscribe* for shares or debentures.

³ Apart from the Act, directors who fairly set out a report are not responsible if it prove to be untrue (*Smith's Case*, [1860] 2 Ch. 604; *Bentley v. Black*, [1883] 5 T. L. R. 580).

⁴ See definition of "promoter" in Section 84, Sub-section 5. It does not include any person "acting in a professional capacity for persons engaged in procuring the formation of the company."

A person *prima facie* liable under this Act may escape liability if he prove—(A) That, having consented to become a director, he withdrew his consent before the issue of the prospectus, and that the prospectus was issued without his authority or consent; or (B) That the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue he forthwith gave reasonable public notice that it was so issued without his knowledge or consent; or (C) That after the issue of the prospectus, and before allotment thereunder, he, on becoming aware of an untrue statement therein, withdrew his consent thereto, and caused reasonable public notice of such withdrawal, and of the reason therefor, to be given.

A director who, being aware that a prospectus was being issued to the public, did not trouble to read it, abstained from inquiry as to its contents, and gave no notice under the Act, is responsible for the contents of the prospectus,¹ and a director who subsequently adopted a prospectus he had not originally approved was held liable²; but directors who did not know that the promoter had issued a prospectus escaped liability, although they subsequently adopted a similar prospectus, and allotted shares subscribed for on the faith of the earlier document.³ Directors must exercise diligence to see that the prospectus is not misleading, themselves examining contracts and other documents to discover their contents. Statements made to the directors by vendors or promoters do not alone afford reasonable grounds for believing the truth of the matters stated.⁴

The Act, therefore, places the onus of proving that he had reasonable ground for believing the prospectus to be true on the director; and if, in answer to the claim, a director alleges that he had reasonable grounds for his belief he will be ordered to give particulars of what those grounds were.⁵ If the misstatement is due to a mistake of law, the fact of having taken the opinion of counsel will not protect the directors as constituting reasonable grounds for belief in the truth of the statement.⁶

A director who did not know of or consent to the issue of the prospectus will not be relieved unless he gave "reasonable public notice," on becoming aware of the issue, that it was done without his knowledge or consent.

In the case of a company existing on the 18th August, 1890, and having at that date issued shares or debentures, which shall

¹ *Dringbier v. Wood*, [1899] 1 Ch. 393.

² *Peck v. Derry*, [1888] 37 Ch. D. 569, 570.

³ *Hoole v. Speak*, [1904] 2 Ch. 732. This case has been much criticised.

⁴ *Adams v. Thrift*, [1915] 2 Ch. 21.

⁵ *Alman v. Oppert*, [1901] 2 K. B. 576.

⁶ *Per Lord Lindley in Shepherd v. Broome*, [1904] App. Cas. at page 347.

issue a prospectus to obtain further capital or debentures, a director who has not authorised the issue of the prospectus, or adopted or ratified it, will not be liable (Section 84, Sub-section (2); but in companies formed after the day mentioned the directors are equally liable, whether the prospectus is issued for obtaining the first or any subsequent subscription for shares or debentures.

The Statute of Limitations (21 Jac. I. c. 16) applies, and will be a bar to proceedings (where concealed fraud is not proved) after six years; but Section 3 of The Civil Procedure Act, 1833, creating a bar after two years in the case of actions for penalties, damages, or sums of money given by Statutes, does not apply.¹ The six years, in the case of the Directors' Liability Act or Section 84 of the Consolidation Act, commence to run from the time when the shares were allotted. But where there is "concealed fraud" the Statute does not begin to run until the fraud is discovered or with reasonable diligence might have been discovered.²

In regard to actions for deceit and other wrongs the principle "*Actio personalis moritur cum personâ*" must be remembered; but this doctrine is subject to the modification that where loss results to the estate of the plaintiff or direct profit to that of the defendant the action survives to the extent of the profit or loss. Thus, where a person who has taken shares on the faith of a fraudulent prospectus dies, his executors can commence or continue an action for the loss suffered by his estate³; but where the director or promoter charged dies, his executors cannot be sued in an action of deceit,⁴ but may be made liable in an action to recover property or money which the deceased actually received: e.g. an action for rescission of a contract and return of the consideration paid will lie against the executors, although damages for the same fraud would not.⁵ If, however, an action for damages has

¹ *Thomson v. Lord Clanmorris*, [1900] 1 Ch. 718.

² *Gibbs v. Guild*, [1882] 9 Q. B. D. 59. It is not easy to say how far "concealed fraud" differs from ordinary fraud. From a passage in Lord Esher's judgment (at page 60) it would appear that there must be some further act of concealment after the cause of action has arisen - as in cases where an agent who had misappropriated money concealed the fact by paying interest as if it had been duly invested. Compare *Moore v. Knight*, [1891] 1 Ch. 547; *McCallum v. McCallum*, [1900] 1 Ch. 143. The fraudulent concealment must be by the person charged (*Thorne v. Heard*, [1895] App. Ca. 495). But in *the Bull Coal Mining Co. v. Osborne*, [1899] App. Ca. 351, the Privy Council held that in equity the lapse of six years was no answer to a claim for secretly taking coal, and in *Oelkers v. Ellis*, [1914] 2 K. B. 139, *Horridge, J.*, held that in an action for rescission of a contract on the ground of fraud the Statute was not an answer if the plaintiff was not guilty of laches in failing to discover the fraud.

³ *Twycross v. Grant* No. 2, [1879] 4 C. P. D. 40.

⁴ *Peek v. Gurney*, [1874] L. R. 6 H. L. 393, and cases there cited; *re Duncan*, [1899] 1 Ch. 337.

⁵ *Philips v. Homfray*, [1883] 24 Ch. D. 439; *re Duncan*, [1899] 1 Ch. 387, where, while dismissing a claim for damages, *Romer, J.*, gave the applicant an opportunity to amend by claiming rescission.

been brought in the lifetime of the defendant, and a complete judgment obtained, it can be enforced against the estate after the defendant's death, but if an inquiry has been ordered, and is not answered, the judgment is not complete, and the action dies.¹ It has now been decided that the principle "*Actio personalis moritur cum personâ*"² also applies to an action under the Directors' Liability Act in cases where no property nor any proceeds or value of property have been received by the deceased director and added to his estate.³

A director or other person whose name is wrongly included in a prospectus is entitled to be indemnified by the directors of the company who authorised or consented to the issue of the prospectus, and any other person who authorised its issue, against any damages or costs incurred in consequence (Section 84, Sub-section 3).

A director or other person who has paid damages for loss arising out of misrepresentation in the prospectus can also recover contributions from co-directors or promoters or others who might have been made liable in the first instance, and for this purpose it is immaterial whether the misrepresentations are fraudulent so as to give rise to an action at Common Law, or are only such as to create liability under Section 84³; but a director who has been guilty of fraudulent misrepresentation cannot recover contribution from one by whom the misrepresentation was made innocently. For enforcing this right to contribution notice of the claim against the third party may be served out of the jurisdiction.³

The liability to contribution was first debated at length in *Shepherd v. Bray*,⁴ where Warrington, J., held that although the action of the shareholder was an action of tort a cause of action for contribution accrued to the directors, who in fact paid damages, as soon as the shares had been allotted, and this right to contribution was in the nature of a contractual obligation, so that the executors of directors who died before the shareholders' actions were concluded were liable to contribute out of the estates of their testators. The case was appealed against, and during the hearing the respondents consented to the appeal being allowed, it being apparent that the Court entertained grave doubts of the correctness of the decision. Cozens-Hardy, M.R., then said, "It must not be assumed that the Court as at present advised . . . are prepared to assent to all that Warrington, J.,

¹ See note ⁵ on page 151.

² *Geipel v. Poach*, [1917] 2 Ch. 108. See also cases cited in the next two notes.

³ *Gerson v. Simpson*, [1903] 2 K. B. 197.

⁴ [1906] 2 Ch. 235.

has decided.”¹ The contribution was held by Warrington, J., to extend to (A) the damages paid to shareholders who brought or threatened actions, including sums paid under a reasonable compromise; (B) the costs as between party and party of the successful plaintiff shareholders; and (C) interest upon the amounts paid as from the dates of payment. But he held that there was no contribution payable in respect of (A) the costs of the directors in opposing the actions by shareholders; (B) the costs of negotiating the compromises; or (C) the costs occasioned by unsuccessful appeals by the directors, whether paid to the plaintiff shareholders or to the directors’ own solicitors. In this case none of the directors had been brought in as third parties to the original action. In *Gerson v. Simpson*,² where the co-director was made a third party, Wills, J., ordered him to pay half the plaintiff’s costs as between party and party, and half the costs of the defence as between solicitor and client. There was no doubt power to make such an order under the rules as to third party procedure, apart from the interpretation of the Directors’ Liability Act.

Besides the foregoing, the liability under the Acts of 1900 and 1907 must be taken into account, and Section 81 of the Act of 1908 (see page 134, *supra*). But it would seem that, as in the case of the old law, only original subscribers for shares or debentures, and not purchasers in the market, will be entitled to the remedy.³

It seems that if the omission is in respect of a matter which would not have influenced the subscriber in deciding whether to take shares or not he will not have any remedy,⁴ for his loss will not have been caused by the default in complying with the statutory duty. In each case it will be for the jury or judge to decide whether if the proper information had been given the subscriber would have abstained from applying for shares.⁵

A number of persons who have subscribed on the faith of the same prospectus may join as plaintiffs in one action, but each must prove separately that he was induced by the untrue statements to take shares,⁶ and claims for rescission against the company, and damages against the directors, whether for deceit or under the Directors’ Liability Act or Section 84, may be included in one

¹ [1907] 2 Ch. 571. It is submitted that it was intended that the executors were not liable at all. See *Geipel v. Peach*, [1917] 2 Ch. 108.

² *Gerson v. Simpson*, [1903] 2 K. B. 197.

³ *Peck v. Gurney*, [1874] L. R. 6 H. L. 377, 400, 411.

⁴ *Wimbledon Olympia, Limited*, [1910] 1 Ch. 630.

⁵ Compare *Nash v. Calthorpe*, [1905] 2 Ch. 237; *Macleay v. Tait*, [1906] App. Ca. 24.

⁶ *Arnison v. Smith*, [1889] 41 Ch. D. 348, where there were fifty-four plaintiffs, of whom twelve, not giving evidence, were non-suited.

action¹; but one shareholder cannot bring an action on behalf of himself and all other persons defrauded,² although an action so brought may be continued on his own behalf alone.²

3. *Action for Misrepresentation in a Prospectus.*—There are certain matters which in practice should be borne in mind in commencing an action for relief in regard to a misleading prospectus. The plaintiff may join as defendants the company, the directors, and any promoter or other person who has become liable by reason of having authorised the issue of the prospectus; but it should not be forgotten that the defendants are justified in severing their defences, and failure against any of the defendants may render the plaintiff liable for an amount of costs which will exhaust the damages he recovers from the other defendants. He should therefore carefully consider the position of the various parties, and only make those defendants against whom success is most probable, not including more than may be necessary to render secure payment of the damages and costs if the action is successful. If the company is solvent it will suffice to proceed against it alone, and the plaintiff is in the strongest position in attacking the company, for in such case he is not required to show that the statements were known to be untrue or that the company had no reasonable grounds for believing them. Even if the company is not solvent it should be made a defendant where the shares are only partly paid, and it is often wise to take this course even where the shares are fully paid for the purpose of obtaining discovery of the company's documents, which is frequently the best or only means of establishing the plaintiff's case. When the promoter is a man of substance and it can be shown that he took part in the preparation of the prospectus (see page 150) it is advantageous to make him a defendant, as he is usually in possession of documents which, if disclosed, upon discovery will assist the plaintiff, and in his case there will frequently be circumstances showing that he either knew the true facts or had information which make it impossible for him successfully to assert that he had reasonable grounds for believing the statements in the prospectus; but when a nominal syndicate has been interposed as a promoter it may turn out that it has no funds and that the expense of making it a defendant is wasted, while if it succeeds in its defence its costs will have to be paid. In choosing which directors to sue the plaintiff should not add more than are necessary, but should select those who can pay if the plaintiff succeeds.

¹ *Frankenburg v. Great Horseless Carriage Co.*, [1900] 1 Q. B. 504.

² *Hallowes v. Ferme*, [1867] 3 Ch. at page 471.

Some pleaders in drawing the statement of claim make numerous charges of fraud and conspiracy and multiply vituperative epithets. This is a grave mistake in tactics. No more should be alleged than is necessary for success in the action, and, whenever the circumstances allow, reliance should be placed rather upon the statutory claim based on the absence of reasonable grounds of belief than on charges of fraud. Where it is necessary or proper to charge fraud, the charge should be made clearly but without undue repetition or elaboration, and above all without exaggeration, leaving the facts to speak for themselves at the trial. Nothing alienates the sympathies of a judge or jury more than gross and unfounded charges against men who show themselves to be honourable, even if they prove to have been careless in the exercise of their duties.

In preparing for trial one of the gravest difficulties arises from the rule that speeches of a chairman or directors at meetings of the company, or reports issued to the shareholders or furnished by agents to the directors, are not evidence against the company.¹ It is usually upon such materials that the plaintiff has decided to commence his action. He should, after obtaining discovery, administer interrogatories to obtain admissions upon the material matters disclosed by the documents, and if the admissions made are not sufficient he must procure direct evidence of the facts, if necessary applying for a commission to take evidence abroad. The report of the Official Receiver in a compulsory winding up is not evidence against the company or the directors or promoters, although it forms a useful guide in framing a case. When the company is being wound up by the Court, application should be made to the Official Receiver for an opportunity to see the relevant documents. He occupies an independent position, and may require an Order of the Court to be obtained on summons before allowing inspection, but may, if he thinks fit, allow it without any such Order, and in such case it is his practice to give each side equal opportunities. In a voluntary winding up the liquidator ought to adopt the same attitude. If he refuses to allow shareholders to see the books and papers of the company when an action is pending application should be made to the Court for an Order.

The answers made by directors or promoters in a public examination in the winding up are evidence against all parties, but, except when used against the person who has given the evidence, the witness must be produced for cross-examination

¹ *Devala, Provident Gold Co.*, [1883] 22 Ch. D. 593; *Djambi (Sumatra) Rubber Estates*, [1912] W. N. 102, 107 L. T. 631.

(see page 582). The answers of persons privately examined under Section 174 are only evidence against the person giving them. A dissatisfied shareholder will not be allowed to examine directors or promoters under this section to obtain evidence in support of his action for damages (see page 584-585).

The plaintiff must be prepared to go into the witness box to prove that his application for shares was made on the faith of the untrue statements.

In preparing the defence of directors or promoters the defendants' solicitors will direct their attention to three lines of defence (1) to show, if possible, that all the impugned statements in the prospectus are true; (2) to show that the directors had reasonable grounds for believing them true; and (3) to show that the plaintiff was not induced by the impugned statements to take his shares, or, in other words, that even if the exact truth had been stated he would none the less have applied for and accepted the shares. A fourth line of defence for the company, if appropriate, will be that the plaintiff, after he knew the truth, either affirmed his position as shareholder by taking some action which he could only take if a shareholder, or that by his delay and acquiescence he has lost his right to repudiate the shares (see page 140). This fourth line of defence will not avail the directors or promoters, but it may be useful as evidence under (3) that the plaintiff did not really consider important the statements of which he now complains.

The measure of damages being the difference between the true value of the shares when the plaintiff received his allotment and the price he gave for them, a successful defence may be set up by showing that at that time the shares were worth par, even though subsequently the company has failed from causes not existing at the time of the allotment (see page 148).

4. *The Company's Rights Against the Promoters or Vendors.*—The company has rights as against the promoters or vendors for misrepresentation inducing the purchase of a property similar to those of a shareholder against the company and the directors respectively.¹ These rights against vendors may be divided into two classes—(a) Where the company is in a position to restore the property to the vendor unaltered, and (b) Where there cannot be such a restitution.

¹In this case the company cannot rely upon the prospectus simply, as it is not addressed to the company, but is a statement to intending subscribers. Where, however, the promoters have prepared or joined in preparing the prospectus it will usually be easy to show that they made the same representation to the directors as are contained in the prospectus.

In the first case, if the company can show that there was a material misrepresentation which induced the purchase, it is entitled to have the contract for purchase rescinded, and to be repaid the purchase money already paid upon giving back the property. If the purchase is not completed by conveyance of the property rescission may be had, whether the representations were made innocently or fraudulently¹; but where the purchase has been completed rescission can only be ordered in cases where fraud is established.² If the company cannot restore the property in the same state as that in which it was bought, there is no remedy against vendors except by an action for deceit, and this only lies where the false representations were made fraudulently (*i.e.* the vendors either knew them to be false, or acted recklessly and without a belief that they were true³), unless the company can make out as its case that the vendors warranted the facts represented to be true, when an action will lie for breach of warranty, and the company may claim damages for the diminished value of the property without restoring it. Also if the thing purchased was valueless (*e.g.* a void concession or an insolvent business) there is nothing to return, and the contract may be avoided and the purchase price recovered without restitution of the property.⁴

In all cases of rescission the complainant must come without unreasonable delay after learning of the misrepresentation, or the company will be held to have acquiesced or to have waived its rights; but the rules are not so stringent in cases between ordinary parties as in those relating to a shareholder proceeding against the company.⁵

The company's rights against a promoter, however, are greater than against vendors who are strangers; for a promoter is a trustee for the company, and is bound to make disclosure to the company of all material facts within his knowledge. He is not entitled to deal with the company as a stranger,⁶ and accordingly the company can recover secret profits from him. Also if at the

¹ *Redgrave v. Hurd*, [1882] 20 Ch. D. 1; *Newbigin v. Adam*, [1887] 34 Ch. D. 582.

² *Seddon v. North-Eastern Salt Co.*, [1905] 1 Ch. 326.

³ *Clarke v. Dickson*, [1858] E. B. & E. 148; and *Sheffield Nickel Co. v. Unwin*, [1877] 2 Q. B. D. 214, where *Lush, J.*, at page 223, says "A contract voidable for fraud cannot be avoided when the other party cannot be restored to his *status quo*. For a contract cannot be rescinded in part and stand good for the residue. . . . The party complaining of the non-performance or the fraud must resort to an action for damages." In *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 423, however, it is stated by *Lindley, M. R.*, that "fraud may exclude the application of the principle" that "a voidable contract cannot be rescinded or set aside after the position of the parties has been changed, so that they cannot be restored to their former position." See also pages 433 and 431.

⁴ *Phosphate Sewage Co. v. Hartmont*, [1877] 5 Ch. D. 394; *Adam v. Newbigin*, [1888] 13 App. Ca. 308.

⁵ Acquiescence is discussed at length in the case first cited in the next note.

⁶ *Erlanger v. New Sombrero Phosphate Co.*, [1879] 3 App. Ca. 1218; *Lydney and Wigpool Co. v. Bird*, [1886] 33 Ch. D. 85; and see pages 105 to 107, *supra*.

time of acquiring the property the vendor to the company was also a promoter, and no independent board has adopted the purchase with knowledge that the promoter was selling his own property, the company can either rescind the contract restoring the property or retain it, reducing the purchase money to the amount the promoter actually spent upon the purchase and otherwise in relation to the property.¹

A man is not necessarily a promoter because at the time he acquires the property he contemplates that at some future time he may form a company to purchase the property²; and if he does not become a promoter until after the acquisition, his only duty is to see that the amount of his profit is known to the purchasing company: otherwise the company may rescind the contract.³ But if he has disclosed that he is making a profit, and fails to make known the amount, rescission is the company's only remedy; and if that has become impossible, the profit cannot be recovered nor damages had.⁴

See also page 105 *et seq.*, *supra*.

UNDERWRITING AND PLACING SHARES.

Prior to the Act of 1900 a company had power in the ordinary course of business to pay a fair and reasonable commission or brokerage upon the issue of its share capital, and underwriting upon proper terms was to that extent lawful,⁵ and that Act and Section 89 of 1908 expressly save "the power of any company to pay such brokerage as it has heretofore been lawful for a company to pay." The Act of 1900 authorised the payment of a commission for taking or placing shares only "upon any offer of shares to the public for subscription." The Act of 1907, Section 8, and the Act of 1908, Section 89, extend the right to cases where the shares are not offered for public subscription. The effect is to allow a commission to be paid (without any limit as to the amount) whether there is or is not a public issue of shares, but subject to the conditions mentioned below. Sub-section 2 of Section 89 prohibits the company, save as authorised by Sub-section 1, from applying any of its shares

¹ Bank of London v. Tyrrell, [1862] 10 H. L. C. 26; Emma Silver Mining Co. v. Grant, [1879] 11 Ch. D. 918. Bentuck v. Fenn, [1887] 12 App. Ca. 652; Gluckstein v. Barnes, [1900] App. Ca. 240, but see Onnum Electric Palaces v. Barnes, [1914] 1 Ch. 332.

² Bentuck v. Fenn, [1888] 12 App. Ca. 652, Lady Forrest (Murchison) Gold Mine, [1901] 1 Ch. 682; Gover's Case, [1876] 1 Ch. D. 182.

³ Dunne v. English, [1874] 18 Eq. 524, Ladywell Mining Co. v. Brookes, [1887] 35 Ch. D. 400.

⁴ Ladywell Mining Co. v. Brookes, [1887] 35 Ch. D. 400, Cape Breton Co., [1885] 29 Ch. D. 795; Lady Forrest (Murchison) Gold Mine, [1901] 1 Ch. 682, Burland v. Earle, [1902] A. C. 83.

⁵ Metropolitan Coal Consumers' Association v. Scrimgeour, [1895] 2 Q. B. 604. The limits within which brokerage may be paid seem to be, "where it is made out that the services of the broker are reasonably necessary, that the brokers are properly employed in the issue of the capital of the company, and that the payment of a commission of so much per share is a fair and just payment for services rendered" (*per* Lopes, L. J., at page 609). *Re Licensed Victuallers' Association*, [1880] 42 Ch. D. 1, carried the right further, but the point was not argued. It would not be safe to pay more than five per cent.

or capital money (as to which see next page) either directly or indirectly in payment of commission, and this applies to private as well as public companies¹; but there is no prohibition against paying commission unconditionally *out of profits*, and this would seem to be lawful unless contrary to any stipulation in the Articles.

The authority to pay a commission out of capital is only "if the payment of the commission is authorised by the Articles, and the commission paid or agreed to be paid does not exceed the amount or rate² so authorised, and if the amount or rate per cent. of the commission paid or agreed to be paid is in the case of shares offered to the public for subscription disclosed in the prospectus," and in other cases if the payment and the amount or rate are disclosed in the statement in lieu of prospectus or in a "statement in the prescribed form," duly signed and filed,³ and also if there is any circular not amounting to a prospectus offering the shares if the like disclosure is made in such circular (Section 89). If a company has not power in its Articles as originally framed to pay commission, there is no reason why the Articles should not be altered so as to include the power. It has been decided that the omission to file the statement makes a contract to pay commission unenforceable and that the statement must be filed before allotment of the shares in respect of which the commission is paid, a subsequent filing not justifying the payment.⁴

The commission may be made payable "to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company," which in business language amounts to authorising payment of commission on "taking, underwriting, or placing shares, or agreeing so to do." It will be noted that to pay a commission to a person for *taking* shares is nearly akin to issuing shares at a discount; but they are not the same things, for if the company went into liquidation before the commission was paid, the whole amount of the shares could be called up, but the shareholder would be an unsecured creditor for the commission, and might not get paid in full.⁵

¹ Dominion of Canada Syndicate v. Briggs, [1911] 2 K. B. 648.

² If the Articles allow of a commission at a specified rate, this is not satisfied by a commission consisting of a lump sum (Booth v. New Afrikaander Gold Mining Co., [1903] 1 Ch. 203).

³ This seems to allow a second statement in lieu of prospectus to be filed where the original statement did not disclose the intention to pay commission.

⁴ Andrene v. Zinc Mines of Great Britain, [1918] 2 K. B. 151, 34 Times L. R. 488. As reported in the Times L. R. the judgment states that filing must be before the allotment of the shares, but in the Law Reports it does not appear that this is the essential date, though it was held in an action to recover commission that filing could not then be effected so as to render payment of commission lawful.

⁵ See Keatinge v. Paranga Consolidated Mines, [1902] W. N. 15.

Under the Act of 1900 there were doubts whether the vendor might pay commissions on the placing of shares. These are removed by Section 89. Sub-section 3, which expressly allows payment by the vendor, provided the other conditions as to authority and disclosure are complied with.

A contract made by a company (other than a private company) is provisional only until such time as the company is entitled to commence business, and this will of course include underwriting contracts; but as the condition for commencing business is the application for and allotment of the "minimum subscription," the fact that at least this amount is underwritten will be some guarantee that the contract will become effective.

On the other hand, the company should see that all the underwriters have paid their application money and that their cheques have been cashed, as in the event of the issue being a failure a few underwriters, by combining not to pay the money payable on application, or stopping their cheques, could prevent the company from going to allotment.¹

The sub-section forbidding any other form of commission out of capital for taking, underwriting, or placing shares (Section 89, Sub-section 2) is very wide in its language, and forbids the application to this purpose of any shares or capital money of the company "either directly or indirectly," "whether the shares or money be so applied by being added to the purchase money of any property acquired by the company or to the contract price of any work to be executed for the company, or the money be paid out of the nominal purchase money or contract price, or otherwise." This was intended to stop the practice, formerly very common, of adding large amounts to the price payable to the vendors, who then arranged the underwriting, giving large blocks of shares to financiers, who guaranteed that sufficient shares should be taken to provide working capital. This is now unlawful unless authorised by the Articles and disclosed in the manner mentioned above.

Lord Davey has said of the words "apply any of its shares or capital money" that they "naturally mean apply its capital, either in the form of shares before issue . . . or in the form of money derived from the issue of shares,"² and Warrington, J., following this dictum, has decided that commission cannot be paid out of a premium payable to the company on the issue of shares.³

¹ As was done in *Mears v. Western of Canada Pulp and Paper Co.*, [1905] 2 Ch. 363.

² *Hilder v. Dexter*, [1902] App. Ca. at page 480.

³ *Shorto v. Colwill*, [1909] W. N. 218, 101 L. T. 598.

The failure to disclose the commission makes the payment illegal, and accordingly no action can be brought to enforce an agreement to pay an undisclosed commission even though the shares have been allotted.¹

The Court will look at the substance of the transaction, and will prohibit a pretended purchase and resale, which is in fact only a device to cover payment of a commission²; but the commission may be of any amount, even ninety per cent.³

It has been held in the House of Lords that an agreement giving underwriters an option to subscribe for further shares as consideration for underwriting is not an application of shares in payment of commission within the section, and is lawful.⁴

The total amount paid by way of commission in respect of any shares or *debentures* or allowed by way of discount in respect of any debentures since the date of the last Annual Return must be stated in the Summary to be filed with the Registrar under Section 26, and the total amount thereof, or so much as has not been written off, must be stated in every balance sheet until the whole amount has been written off (Section 26, Sub-section 2 (f), and Section 90).

The contract under the section may be either to place the shares (*i.e.* procure others to take them) or to take the shares either unconditionally or in the event of the public or others not taking up the shares. In the case of a contract to place shares the remedy of the company in case of breach is in damages only.⁵ In the other cases, if the contract is with the company it can place the underwriter on the Register of Members, but if the contract is with the promoters only the company has no direct remedy; but usually the underwriter authorises the promoters to make the application for shares, and on his doing so the company can allot to the underwriter the number of shares for which he is liable.

The following paragraphs describe the common form of underwriting:—

The contract of underwriting is an agreement by persons that, if the whole or a certain proportion of the capital is not applied for by, the public, they will themselves apply or find responsible persons to apply for the balance or a certain proportion of the balance of the capital. The consideration to the underwriters is the payment of

¹ *Andrae v. Zinc Mines of Great Britain*, [1918] 2 K. B. 454.

² *Booth v. New Afrikaner Gold Mining Co.*, [1903] 1 Ch. 295.

³ *Keatinge v. Paranga Consolidated Mines*, [1902] W. N. 15, 18 T. L. R. 266.

⁴ *Hilder v. Dexter*, [1902] App. Ca. 471, overruling *Burrows v. Matabele Gold Reefs and Estates Co.*, [1901] 2 Ch. 23, although Lord Brampton distinguished the latter case.

⁵ See *Gorriessen's Case*, [1873] 8 Ch. 507.

a commission, to be received by them whether they are called upon to take up any shares or not.¹

An underwriting or sub-underwriting letter usually authorises the person to whom it is addressed to apply in the name of the underwriter should he fail to do so when called upon. Such an authority is held to be "an authority coupled with an interest," and, therefore, after acceptance by the promoter, it is irrevocable²; and the agent is agent to receive notice of allotment as well as to make the application; but, apart from this, as soon as the application is delivered to the company it is irrevocable as between the company and the underwriter or sub-underwriter.³ Before applying, the recipient of the letter must carefully perform all conditions. He must have accepted the underwriting letter, and communicated his acceptance to the underwriter, to make the bargain a binding one⁴. If the words "when called upon" are used, the underwriter must have been first called upon to subscribe,⁵ and the terms of the contract performed. Where the underwriting letter contains a provision that it is to hold good notwithstanding any variation in the prospectus, the underwriter will not be bound if the changes are such as practically to constitute a different venture⁶.

An underwriter, although he may have signed his underwriting letter before the company was formed, can obtain relief on the ground of misrepresentation if the directors have allotted him shares knowing that he relies upon a draft prospectus used for obtaining underwriting (see page 139, *supra*); but if he did not rely on the draft prospectus, but was satisfied by the names of the directors, he will not obtain relief.⁷ The Court will also view his probable motives with different eyes, as his object is not to hold the shares, but to earn his commission.⁷

The retention of the underwriting letter by the promoter with the consent of the underwriter raises an inference that the bargain is complete,⁸ and an apparent authority from the underwriter may estop him from denying that he is bound⁹; and if when the letter reaches the company a form of acceptance appears on the letter, properly filled up, the underwriter may be estopped

¹ The meaning of "underwriting" was declared by the Court of Appeal after hearing evidence in *re Licensed Victuallers' Mutual Trading Association*, [1889] 42 Ch. D. 1.

² *Carmichael's Case*, [1896] 2 Ch. 643, *Olympic Reinsurance Co.*, [1920] Ch. 341. Even death does not determine the authority (*Carter v. White*, [1891] 25 Ch. D. 606).

³ *Olympic Reinsurance Co.*, [1920] 2 Ch. 341.

⁴ *Consort Deep Level Gold Mines, ex parte Stark*, [1897] 1 Ch. 575.

⁵ *Harvey's Oyster Co.*, [1891] 2 Ch. 474. *Brussels Palace of Varieties v. Procter* [1893] 10 Times L. R. 72, *ex parte Cox Hughes*, [1896] 75 L. T. 609.

⁶ *Warner International Co. v. Kiburn*, [1914] W. N. 61; 110 L. T. 456; 84 L. J. Ch. 1305.

⁷ *Baty v. Keswick*, [1901] 85 L. T. 18.

⁸ *Ex parte Cox Hughes*, [1896] 75 L. T. 609.

⁹ *Bultfontein Sun Diamond Mine*, [1896] 12 T. L. R. 461.

from denying that the contract was complete,¹ though it would be otherwise if the company knew or had notice that the acceptance or the communication of it was insufficient. If the underwriting letter states that "this engagement is binding for two months" the Court of Appeal has held that it means "this offer shall remain open for two months," and an acceptance even after the subscription lists were closed is binding.² Of course this form of agency, like any other, is capable, even if originally defective, of being ratified. Where an underwriter agreed to subscribe for shares "at par" upon the terms of the prospectus, which stated that the shares were to be issued at a premium of one shilling, it was held that the words "at par" must be rejected as inconsistent with the rest of the document.³

The contract of underwriting can be enforced against the executors of a deceased underwriter,⁴ and even if there are duties imposed of finding capital this is not such a personal contract as to expire with the contractor.⁵

The underwriting letter usually declares that it is to be binding, notwithstanding variations in the prospectus, but this provision will not allow of great changes being made or a new venture being substituted.⁶

The prospectus must state "the amount (if any) paid within the two preceding years or payable as commission for subscribing or agreeing to subscribe, or procuring or agreeing to procure subscriptions, for any shares in or debentures of the company, or the rate of any such commission" (Section 81, Sub-section 1 (h)).⁷ The statement must be specific, for any "waiver" clause or clause affecting to give notice of any matter not specifically stated is void (Section 81, Sub-section 4). The question often arose under the Act of 1900 whether the dates of and parties to sub-underwriting contracts required statement under the sub-section requiring the disclosure of material contracts. In one case, in which the prospectus stated that the vendors had agreed to underwrite the capital at a commission of seven and a half per cent., it was argued for the plaintiff that sub-underwriting contracts made with the vendors at five per cent. were material and ought to have been disclosed, Lord Alverstone, L. C. J., left the question to the jury, who found that such sub-underwriting contracts were not material,⁸ and

¹ *Re Henry Bentley & Co.*, [1893] 69 L. T. 204. But it appears from *Consort Deep Level Gold Mines, ex parte Stark*, [1897] 1 Ch. 575, that this case is not to be generally applied.

² *Hindley's Case*, [1896] 2 Ch. 121.

³ *Greater Britain Reinsurance Co.*, [1921] 124 L. T. 194.

⁴ *Warner Engineering Co. v. Brennan*, [1914] 30 T. L. R. 191.

⁵ *Re Worthington, ex parte Pathé Frères*, [1914] 2 K. B. 299.

⁶ *Warner International Co. v. Kilburn*, [1914] W. N. 61; 110 L. T. 456, 84 L. J. Ch. 1365.

⁷ The Act of 1900 did not require any statement of the underwriting commission on debentures.

⁸ *Calvert v. Kintore*, *Times*, 18th November, 1904.

Section 81, Sub-section 1 (*h*), now expressly provides that it shall not be necessary to state the commission payable to sub-underwriters. A contract by a promoter with a vendor to the company that he will place a large block of shares is not such a personal contract that on the death of the promoter it falls to the ground, although it seems that there might be circumstances in which the Court would hold that a particular promotion required special qualities in the promoter, so that the parties must have contemplated that in the event of his death the bargain would determine.¹

It was at one time a not uncommon form of fraud for persons to be introduced as underwriters who could not possibly pay if required. A company should inquire closely into the substantiality of the proposed contractors.

An underwriting contract requires a sixpenny stamp if under hand only. If under seal the duty is generally ten shillings; but in cases where an undertaking is given to pay a definite sum of money covenant duty at the rate of 2s. 6d. for every £100 is charged.

PAYMENT OF PRELIMINARY EXPENSES.

The preparation, printing, circulating, and advertising the prospectus of a company, and the preparation and printing of the Memorandum and Articles, as well as the duty and fees upon registration, involve considerable expense, most of which is incurred before the company is formed, and the liability to pay the various amounts often gives rise to litigation. It is usual to take powers in the Memorandum to pay such expenses, but even without this power the company is justified in paying preliminary expenses, including a commission for the placing of its shares.²

The question of liability, however, is distinct from that of power to pay, and even the inclusion in the Memorandum or Articles of a direction that the company shall pay, or that the company shall adopt an agreement rendering it liable to pay, the preliminary expenses will not give the promoters or persons who have rendered service in regard to the formation of the company any right of action against the company³; for, although the Articles of Association are binding on the company and its members as if each member had covenanted to conform thereto,

¹ *Re Worthington ex parte Pathé Frères*, [1914] 2 K. B. 299.

² *Licensed Victuallers' Association*, [1889] 42 Ch. D. 1; *Metropolitan Coal Consumers' Association v. Scrimgeour*, [1895] 2 Q. B. 604, and see the old Table A, Clause 55.

³ *Rotherham Chemical Co.*, [1884] 25 Ch. D. 103, *Mellado v. Porto Alegre Co.*, [1874] L. R. 9 C. P. 503, *Empress Engineering Co.*, [1881] 16 Ch. D. 125; *Scott v. Lord Ebury*, [1867] L. R. 2 C. P. 255.

this is not a provision of which outsiders can take advantage, nor can a person who is a member take advantage of it for securing benefits outside his rights as a member.¹

If any person before the company is registered purports to contract, on the company's behalf to pay, he will himself be liable if the company fails to take over the bargain, for a man contracting nominally as agent is himself liable if he has no principal in fact.²

A company cannot ratify contracts made before it was in existence, but must after its incorporation contract anew.³ Before its incorporation a company clearly cannot request the promoter to undertake work and incur expense for its benefit, and therefore the promoter, to protect himself, must see that as soon as the company is formed it enters into a proper contract to pay the preliminary costs. In doing this it must be remembered that a past consideration is not a good one, and that unless there is some new benefit given to the company there is no consideration for the contract. This is most important, for a contract to issue shares as fully paid will not protect the allottee from having to pay up the whole amount thereof, unless there was good consideration for the contract: *i.e.* either an existing debt which was extinguished, or a promise to do further work or hand over property.⁴ The promoter should, therefore, always make the agreement to pay for past work and services a part of an agreement to continue to render services, or of the contract to sell property to the company. The solicitors, printers, and advertising agents should see that they have a retainer from or a bargain with the promoter to pay them in case the company does not

If a claim is made against the promoter the question will be, Was the contract with or the work done for the promoter? or, Was it made or done in the hope of being paid by the company in case it should adopt the work and agree to pay the expenses? In the latter case the promoter will not be liable, even if the company does not pay, and the company is only liable if it adopt the work and agree to pay for it.

It has been said that a company may, however, become liable in equity to pay for work not ordered by it, but of which it has had the benefit,⁵ in cases where the work was not upon the retainer of

¹ *Eley v. Positive Assurance Co.*, [1876] 1 Ex. D. 88, *Browne v. La Trinidad*, [1888] 37 Ch. D. 1.

² *Scott v. Lord Ebury*, [1867] L. R. 2 C. P. 255.

³ See page 112, *supra*.

⁴ *Eddystone Marine Insurance Co.*, [1893] 3 Ch. 9.

⁵ *Hereford and South Wales Wagon Co.*, [1876] 2 Ch. D. 621; *Empress Engineering Co.* [1881] 16 Ch. D. 125.

some person who is liable to pay¹; but doubt has been thrown by the Court of Appeal on the earlier part of this proposition, and it seems that even in regard to the fees on filing the Memorandum² (which by Section 17 of the Act of 1862 or Table B in Schedule I. of the Act of 1908 are payable by the company) the persons paying the preliminary expenses will not be entitled to repayment unless an express contract to pay them is made after the company is registered.³

The duty on the capital, when paid by a solicitor, must be included in his "cash account," and not in his bill of costs, a matter of importance if a taxation takes place and one sixth of the bill is taxed off.⁴

The practice of companies going to allotment with a wholly insufficient amount of capital, solely in order that the promoters may be paid the preliminary expenses, is checked by the provision which requires the minimum subscription to be stated (Section 85).

Section 81, Sub-section 1 (*i*), requires the prospectus to state "the amount or estimated amount of preliminary expenses," which seems to include even the case where such expenses are not paid or payable by the company. This makes it necessary to consider what payments are and what are not "preliminary expenses"—a question of some difficulty and one to which the answer will vary with the circumstances. The following are suggested as being clearly "preliminary expenses," but the list must not be considered exhaustive:—

1. The cost of preparing, settling, and printing the Memorandum and Articles of Association.
2. The cost of registering the company and the various documents required by the Acts, including stamp duties and fees
3. The cost of preparing, printing, and circulating or advertising the prospectus.
4. The cost of the preparation and execution of all preliminary agreements, including the stamp duties thereon.
5. The fee (if any) paid to brokers for allowing their names to be advertised on the prospectus.
6. Law costs in connection with the formation and registration of the company and the preparation and issue of the prospectus.

¹ Rotherham Chemical Co., [1884] 25 Ch. D. 103

² Clinton's Claim, [1908] 2 Ch. 515, overruling the decision of Buckley, J., in *English and Colonial Produce Co.*, [1906] 2 Ch. 435.

³ *Re English and Colonial Produce Co.*, [1906] 2 Ch. 435.

⁴ *Re Blair and Girling*, [1906] 2 K. B. 131.

7. The cost of the preparation and printing of the debentures and the debenture trust deed (if any), including the stamp duty.
8. The cost of preparing, printing, and stamping letters of allotment and printing share certificates.

Probably, also, the cost of preparing and making the original books and seal of the company should be reckoned as preliminary expenses.

The amount paid or payable for underwriting commission, and the amount paid or intended to be paid to any promoter, have to be stated separately. If the amount is not included in the figure given for preliminary expenses it will be advisable to state expressly that the amount named is exclusive of these.

COMMENCEMENT OF BUSINESS.

Prior to the Act of 1900 a company might commence business as soon after incorporation as its directors thought fit, however small might be its subscribed capital; and this is still the case with private companies.

But by Section 87 no public company¹ registered after the 31st December, 1900, may commence business or exercise any borrowing powers unless (1) the "minimum subscription"² has been allotted, subject to the payment of the whole amount thereof in cash; (2) every director has paid on each of the shares taken or contracted to be taken by him, and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares offered for public subscription, or in the case of a company not issuing a prospectus on the shares payable in cash; and (3) a statutory declaration by the secretary or one of the directors that these conditions have been complied with has been filed with the Registrar, who will then certify that the company is entitled to commence business, and his certificate will be conclusive evidence to that effect.³ In the case of companies not issuing a prospectus there is a further condition that a statement in lieu of prospectus shall have been filed (Section 87). Associations not for profit, companies limited by guarantee, and unlimited companies, if registered without a

¹ This section does not apply to private companies within the statutory definition, or to any company registered before the 1st July, 1908, which does not issue a prospectus to the public (Sub-section 6).

² As to the minimum subscription see pages 169 and 171, *infra*.

³ The Court will not listen to any evidence that there have been irregularities if the certificate has been given (*re* Yolland, Hutton and Berkett, Limited, [1909] 1 Ch. 152; National Provincial and Union Bank of England v. Charley, [1921] 1 K. B. 431, and see page 275, *infra*).

share capital, are in law public companies (see page 455), and must therefore file the declaration, although it is quite inappropriate.

The company can, prior to becoming entitled to commence business, make contracts, but such contracts will be provisional only, and will not bind the company until it becomes entitled to commence business, when they will without further formality become binding (Section 87, Sub-section 3). If the company is wound up without having become entitled to commence business, persons who have supplied goods or rendered services will have no claim against the company.¹ The Act does not state what the position of the person contracting with the company will be in the meantime. Presumably he will be bound, and he should therefore always insert a provision in the contract that if the company does not become entitled to commence business within a limited time he shall be entitled to rescind the contract.

Section 87, Sub-section 4, expressly authorises "the simultaneous offer for subscription or allotment of any shares and debentures or the receipt of any money payable on application for debentures," removing an ambiguity in the words contained in the Act of 1900.

If any company commences business or exercises borrowing powers in contravention of the section, every person responsible for the contravention is without prejudice to any other liability, liable to a fine of fifty pounds for every day during which such contravention continues.

The date for holding the statutory meeting is fixed "within a period of not less than one month nor more than three months from the date at which the company is entitled to commence business" (Section 65); but a private company is entitled to commence business immediately on incorporation, and must therefore hold its statutory meeting not less than one month nor more than three months after incorporation.

PRELIMINARIES TO COMMENCING BUSINESS AND HOLDING THE STATUTORY MEETING.

It will be convenient to set out the steps necessary to be taken in the case of all public companies before business can be commenced and the statutory meeting held.

1. Prepare and register the Memorandum and Articles of Association. If the directors are named in Articles filed at the same time as the Memorandum, the directors must

¹ *Otto Electrical Co.*, [1906] 2 Ch. 390. Even the bank which received the application moneys cannot recover for its services (*New Druce Portland Co. v. Blakiston*, [1908] 24 T. L. R. 583).

- have subscribed the Memorandum for their qualification shares (if any), or have signed and filed with the Registrar a contract in writing to take from the company and pay for their qualification shares, if any (Section 72).
2. The applicant for the registration of the company must at the same time deliver to the Registrar a list of the persons who have consented to be directors, and a consent to act as directors must also be filed (Section 72).
 3. Public companies not issuing a prospectus must prepare and file a statement in lieu of prospectus, which must be signed by the directors (Section 82). This is a condition precedent to the right to allot shares or debentures or commence business (Section 87).¹
 4. Companies issuing a prospectus will prepare a prospectus containing the particulars required by the Act and bearing the date of its publication. Every person named as a director or intended director must (by himself or his agent authorised in writing) sign a copy of this prospectus, which must then be filed with the Registrar. The date of the prospectus must not be earlier than the date of its being tendered for filing (Sections 80 and 81: see page 124, *supra*).
 5. Issue the prospectus to the public; but it is advisable to ascertain that it has passed the second official examination at the Registry before actually issuing it (see page 125, *supra*).
 6. When applications for shares to the amount of the "minimum subscription" (see page 174, *infra*), together with the application moneys, have been received and the cheques cashed,² go to allotment (Section 85, Sub-sections 1 and 7). If within forty days after the first issue of the prospectus applications to the amount of the "minimum subscription" have not been received, or the amounts payable on application therefor have not been received in cash, the application

An allotment of shares made before the filing of the statement is void (*Blair Open Hearth Furnace Co.*, [1914] 1 Ch. 390; *Jubilee Cotton Mills, in re*, [1923] 1 Ch. 1; [1924] A. C., *per* Lord Dunsedin at page 909; *contra*, *Lord Sumner*, at pages 975, 976), but is not void if a statement has been filed although such statement does not fully comply with the provisions of the Act (*Blair Open Hearth Furnace Co.*, *supra*).

² Allotment made before the money is "paid to and received by" the company is voidable; and the money is not received until the cheques are cashed (*Mears v. Western of Canada Pulp and Paper Co.*, [1905] 2 Ch. 353; *National Motor Mail Coach Co.*, [1908] 2 Ch. 228). An allotment made before filing the Statement in Lien of Prospectus is void (see previous note).

moneys actually received must be returned within forty-eight days after the issue of the prospectus (Section 85, Sub-section 4).¹

7. Within one month (*i.e.* calendar month) after allotment file with the Registrar a Return of the Shares allotted (Section 88: see page 182, *infra*).
8. File with the Registrar a statutory declaration by the secretary or one of the directors that (A) shares subject to the payment of the whole amount thereof in cash have been allotted to an amount not less than the "minimum subscription" (see page 174, *infra*), and (B) that the directors have paid the amount due on application and allotment, and obtain the Registrar's certificate that the company is entitled to commence business (Section 87: see page 167, *supra*).

The company on receiving the Registrar's certificate is entitled to commence business and to exercise its borrowing powers. Not less than one month nor more than three months from the date at which it is entitled to commence business the company, if limited by shares (but not a company limited by guarantee), must hold its statutory meeting (Section 65).

9. At least seven days (*semble* these must be clear days) before the day on which the statutory meeting is to be held the directors must prepare and forward to every member and any debenture holders the Report required by Section 65 (see pages 355 and 356, *infra*), containing the auditors' certificate as to receipts and payments.²
10. Immediately after issuing this Report the directors must file a copy of it with the Registrar (Section 65, Sub-section 5).
11. The statutory meeting must be held within the limit of time above mentioned. At the commencement of the meeting a list of the names, descriptions, and addresses of the members, showing the shares held by them, must be produced, and remain open for inspection during the meeting (Section 65, Sub-section 6).

¹ This only applies to the first allotment of shares offered to the public for subscription. The sub-section as to returning application money is *not* made to apply to companies *not* issuing a prospectus.

² Private companies are not obliged to forward this Report to their members or to file it (Section 65, Sub-section 10).

CHAPTER IX.

SHARES AND TRANSFERS.

SHARES.

SHARES have been defined as follows:—"The common stock" (contributed by the members) "is denoted in money, and is the capital. The persons who contribute it or to whom it belongs are members. The proportion of capital to which each member is entitled is his share."¹ "The word 'share' does not denote rights only: it denotes obligations also."² "A share is the interest of a shareholder in the company, measured by a sum of money for the purpose of liability in the first place and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders *inter se* in accordance with Section 16 of The Companies Act, 1862. . . . A share is not a sum of money, but is an interest measured by a sum of money, and made up of various rights contained in the contract."³

As already stated, the Memorandum of a company limited by shares must state the amount of the company's capital, "and the division thereof into shares of a fixed amount" (Section 3); and by Section 22 it is declared that "the shares or other interest of any member in a company shall be personal estate, transferable in manner provided by the Articles of the company, and shall not be of the nature of real estate," and "each share in a company having a share capital shall be distinguished by its appropriate number."

Shares, being (as above stated) personal estate, pass to the executors or administrators—not to the heir. It is usual for the Articles to state that only the executors or administrators will be recognised as having any right to the shares: that is to say, that, although the will of a deceased shareholder gives the shares to some person other than the executors, the company will require a transfer from the executors before registering the legatee.

Prima facie "shares" are not "securities" so as to fall within an investment clause in a Will, authorising the purchase or

¹ "Landley on Companies," Sixth Edition, page 1.

² *Per* Landley, L. J., in *Taylor, Phillips and Rickard's Case*, [1897] 1 Ch. 305 (see page 201, *infra*).

³ *Per* Farwell, J., in *Borland's Trustee v. Steel Brothers & Co.*, [1901] 1 Ch. 286.

holding of securities, but this rule may be qualified by the context so as to make it proper to hold that shares are within such a power.¹

Shares transferable by deed are "things in action" within the meaning of the exception in Sub-section (c) of Section 38 of The Bankruptcy Act, 1914, and accordingly are not within the provisions of that Act in relation to goods in the "order and disposition" of a bankrupt, so that a mortgage or charge cannot be defeated by the trustee in bankruptcy under those provisions.² Upon the bankruptcy of a shareholder his shares vest in his trustee, who becomes entitled to transfer them or to disclaim the interest of the bankrupt, but not thereby to defeat the interest of others in the shares.³

Shares are "goods" within Order L., Rule 2, which empowers the Court to order the sale of any "goods, wares, or merchandise" it may be desirable to sell pending an action.⁴

APPLICATIONS FOR SHARES.

The contract to take shares is generally made by application and allotment, and for this purpose a form of application for shares is usually issued with the prospectus, to be filled up by the applicant and left at the office of the company or with its bankers, accompanied by a deposit of a specified amount for each share applied for. In cases where a prospectus is not issued it is advisable to have these forms ready for applicants to fill up, in order to prevent dispute as to the conditions under which the shares were applied for. But it is not absolutely necessary to have a printed form, as a letter applying for shares, or even a verbal application, is sufficient.⁵

A person having authority may apply in the name of another.⁶ In such cases the directors should always require to see the alleged authority, and consider whether its terms justify the application. In cases where the capital is underwritten the underwriting letter usually authorises the person to whom it is addressed to apply in the name of the underwriter if the latter fails to do so. Care must then be taken to see that all preliminaries have been complied with.⁷

¹ *Ogle v. Kupe*, [1869] 8 Eq. 434; *re Rayner*, [1904] 1 Ch. 176, *re Johnson*, [1904] 89 L. T. 520.

² *Colonial Bank v. Whinney*, [1887] 11 App. Ca. 426.

³ Bankruptcy Act, 1914, Sections 39, 48, Sub-section 3, and 54, *Wise v. Landsell*, [1921] 1 Ch. 420, *Cannock v. Rugeley Colliery*, [1885] 28 Ch. D. 363.

⁴ *Evans v. Davies*, [1893] 2 Ch. 216.

⁵ *Cookney's Case*, [1859] 3 De G. & J. 170, *Bloxam's Case*, [1864] 4 De G. J. & S. 447.

⁶ *Duff's Executors' Case*, [1896] 32 Ch. D. 301; *Levitt's Case*, [1870] 5 Ch. 489; *Cookney's Case*, [1859] 3 De G. & J. 170. See also page 86, *supra*.

⁷ See page 162, *supra*.

The form of application is usually to the following effect, but the words may be varied according to circumstances:—

TO THE DIRECTORS OF THE COMPANY, LIMITED.

GENTLEMEN,—Having paid to the company's bankers the sum of £ , being a deposit of per share on application for shares of £ each in THE COMPANY, LIMITED, I request you to allot me that number of shares upon the terms of the prospectus dated the day of , 19 . I hereby agree to accept such shares, or any smaller number you may allot to me,¹ subject to the provisions of the Memorandum and Articles of Association of the Company, and I authorise you to place my name upon the Register of Members in respect of the shares so allotted.

Usual Signature ..
 Name in full ..
 Address ..
 Profession or Occupation ..
 Date ..

Until notice has been sent to the applicant that the shares are allotted he is entitled to withdraw his application, and to claim repayment of his deposit.²

ALLOTMENT OF SHARES

A public company cannot go to allotment unless it has either filed a prospectus or a statement in lieu of prospectus (Sections 82 and 85). When this has been done, if sufficient applications for shares are received to justify the company going to allotment (not being less, in the case of all except private companies, than the minimum mentioned below³), the directors meet and pass a resolution allotting the shares to such of the applicants as they think fit, and the secretary is instructed to send notices of the fact to the persons receiving an allotment, and letters of regret to those whose applications are refused.

As the law stood prior to 1901 the directors might go to allotment and commence business although only a portion—even a very small portion—of the capital was applied for; but one of the principal objects of the Act of 1900 was to prevent allotments being made upon insufficient applications, and business being commenced without a reasonable capital. As it is obvious that the Legislature cannot fix what is a reasonable amount of capital, the above object is sought to be attained by providing that the persons applying shall at least have full knowledge of the amount upon which allotment will be made.

¹ As to the importance of these words see page 179, *infra*.

² *Pentelov's Case*, [1869] 4 Ch. 178, *Wilson's Case*, [1869] 20 L. T. 962, *Gunn's Case*, [1869] 3 Ch. 40.

³ Until the 30th June, 1908, companies not issuing a prospectus were free from the requirements as to minimum subscription. Private companies are still outside them.

If an allotment is made (in the case of a company not issuing a prospectus) before filing the statement in lieu of prospectus it is void, but this is not so if the statement has been filed, but is defective.¹

Whether the company issues a prospectus or files a statement the provisions of Section 85 must be complied with; they are to the following effect, but apply only to the "first allotment of shares offered to the public for subscription" (Sub-section 6):—By Sub-sections 1 and 2 provision is made for what is called in the Act a "minimum subscription," which is "the amount (if any) fixed by the Memorandum or Articles *and* named in the prospectus as the minimum subscription upon which the directors may proceed to allotment; *or* if no amount is so fixed and named, then the whole amount of the share capital" offered to the public for subscription.² Sub-section 1 also enacts that no allotment shall be made of any shares offered to the public for subscription unless the "minimum subscription" has been subscribed and the sum payable on application for that amount (not being less than five per cent.) has been "paid to and received by" the company,³ which sum, payable on application, must not be less than five per cent of the nominal amount of the shares (Sub-section 3). Sub-section 7 makes similar provisions as to companies not issuing a prospectus, in which case the minimum subscription, besides being fixed by the Memorandum or Articles, must be named in the statement in lieu of prospectus, and if not so fixed and named is the whole amount of the shares other than those issued or agreed to be issued as fully or partly paid up otherwise than in cash, and the amount of five per cent. must be paid up as application money. Private companies are free from these obligations.

If more than one prospectus is issued, the words "the prospectus" mean the document on the basis of which the applicant claiming relief has actually subscribed. And if one prospectus fulfils the statutory conditions, but another does not, only those who subscribed on the latter are entitled to relief.⁴ A statement that "the company is in a position at once to allot

¹ *Blair Open Hearth Furnace Co.*, [1914] 1 Ch. 300, *Jubilee Cotton Mills, supra*, [1923] 1 Ch. 1, [1924] A. C., *per* Lord Dunsedin at page 969; *contra, per* Lord Sumner at pages 975, 976.

² Note that the "minimum subscription" is the whole amount offered to the public unless a smaller amount is *both* fixed in the Memorandum or Articles *and* named in the prospectus. It has been held by Neville, J., that if the Articles state that the minimum subscription is ten per cent. of the shares offered for subscription, that will suffice (*West Yorkshire Darnley Agency*, [1908] W. N. 236, 25 T. L. R. 77). It is difficult, however, to see how it can be said that this amount is "fixed" by the Articles.

³ Sub-section 2 declares that the minimum subscription is to be reckoned "exclusively of any amount payable otherwise than in cash." This appears unnecessary, for the amount "offered to the public for subscription" would always be payable in cash.

⁴ *Roussell v. Burnham*, [1909] 1 Ch. 127.

one thousand shares, according to the provisions of its Articles," is not a sufficient statement that the minimum subscription is one thousand shares.¹

Cheques received before allotment but after banking hours, and not cashed till the day after allotment, have been held in Scotland to be money "paid to and received by the company"²; but cheques received before allotment and subsequently dishonoured do not constitute payment, even though immediately replaced by other cheques³; nor do cheques received and held over, although subsequently honoured⁴: accordingly the directors should never go to allotment until the cheques for the application moneys have been cashed.

If the conditions above mentioned are not complied with, in the case of a company issuing a prospectus, within forty days after the first issue of the prospectus,⁵ all money received from applicants must be repaid without interest, and if not repaid within forty-eight days from the issue of the prospectus the directors become jointly and severally liable to repay the amounts, with interest at five per cent. from the expiration of the forty-eight days. A director who is able to show that the loss of the money was not due to any misconduct or negligence on his part will, however, escape liability (Section 85, Sub-section 4). This liability only exists where there is no allotment; if the directors proceed to allotment in contravention of the section the liability under Section 86 is substituted.⁶ Any condition purporting to deprive the applicant of the benefit of this section is void (Section 85, Sub-section 5). There is no similar provision as to the return of money in the case of companies not issuing a prospectus.

As before mentioned, these provisions, with the exception of that relating to the application money being at least five per cent., only govern the first public allotment; but in cases of second or subsequent offers of shares the prospectus must state the minimum subscription for the shares then offered, the amount offered for subscription on each previous allotment made within the two preceding years, the amount actually allotted, and the amount paid up (Section 81, Sub-section 1 (d)).

In estimating whether the "minimum subscription" has been reached, there seems no reason for excluding shares taken by

¹ *Roussell v. Burnham*, [1900] 1 Ch. 127.

² *Glasgow Pavilion v. Motherwell*, [1904] Court of Sess., 6 F. 116; but this is doubtful (see next note).

³ *Mears v. Western of Canada Pulp and Paper Co.*, [1905] 2 Ch. 353, where doubt was thrown on the Scotch decision cited in the preceding note, *Burton v. Bevan*, [1908] 2 Ch. 240.

⁴ *National Motor Mail Coach Co.*, [1908] 2 Ch. 228.

⁵ By Section 80 every prospectus must be dated, "and that date shall, unless the contrary be proved, be taken as the date of publication of the prospectus", but the issue of the prospectus appears to mean its actual issue by being circulated or advertised.

⁶ *Burton v. Bevan*, [1908] 2 Ch. 240.

underwriters, provided that the agreement under which they take shares is complete (*e.g.* that there is no condition remaining unfulfilled at the time of allotment) and that their application money is paid.

The provisions above referred to relate only to allotments of shares, and do not govern issues of debentures.

If shares are allotted in contravention of the provisions of Section 85 the allotment is not void, but only voidable, and then only if the applicant applies within one month after the holding of the statutory meeting (Section 86). It is not necessary that the dissatisfied applicant should take proceedings within the month or before liquidation is commenced if he has given notice avoiding the allotment within the month and commenced action within a reasonable time¹ He will also be precluded from avoiding the allotment if he has expressly or by conduct affirmed it with knowledge of the irregularity.² The right to have the allotment avoided for this cause, however, is not taken away by reason of the company having gone into liquidation in the meantime (Section 86, Sub-section 1). Any director of the company knowingly³ contravening or permitting the contravention of the provisions of the Act as to allotment is liable to compensate the company and the allottee respectively for any loss, damages, or costs sustained or incurred thereby, provided that the proceedings to recover such loss, damages, or costs are commenced within two years after the date of the allotment (Section 86, Sub-section 2). A director who was not present at the meeting making the allotment and did not know of the irregularity is not liable, even though he was present and voted at a subsequent meeting confirming the minutes recording the allotment.⁴ It would seem that in general the loss to the company would only be the costs of proceedings by the allottee to avoid the allotment. The loss of the allottee's subscription would not be caused by the contravention of the Act. It might, however, be contended that loss incurred in the company's business, which would never have been commenced but for the improper allotment, is caused by the contravention of the Act.

These provisions as to avoidance of the allotment and compensation by directors apply to an allotment made in contravention of Section 85, Sub-section 7, requiring a minimum subscription in the case of companies not issuing a prospectus.

¹ *National Motor Mail Coach Co.*, [1908] 2 Ch. 228.

² *Finance and Issue, Limited, v. Canadian Produce Co.*, [1905] 1 Ch. 37.

³ "Knowingly" means knowing the facts which constitute the contravention. Ignorance or mistake as to the legal effect of the facts is no protection (*Burton v. Bevan*, [1908] 2 Ch. 240, *Shepherd v. Broome*, [1901] App. Cas. 342).

⁴ *Burton v. Bevan*, [1908] 2 Ch. 240.

In deciding upon the making of allotments the directors must "dispose of their company's shares on the best terms obtainable, and must not allot them to themselves or their friends at a lower price in order to obtain a personal benefit. They must act *bonâ fide* for the interests of the company."¹ But this does not mean that when the market price is at a premium shares cannot be issued at par. "I am not aware," says Lord Davey, "of any law which obliges a company to issue its shares above par because they are saleable at a premium in the market. It depends on the circumstances of each case whether it will be prudent or even possible to do so, and it is a question for the directors to decide."² But when the shares command a premium, the directors must not allot them at par to members of their own body or their friends, for they should either offer them equally to all the shareholders or obtain the benefit of the premium for the company³; but an allotment to the directors, if sanctioned by a general meeting of the company, cannot be impeached, even though the directors hold the majority of the shares and vote in favour of the allotment of the shares to themselves.⁴ Directors, moreover, must not allot shares to themselves or their friends for the purpose of obtaining the control of the voting power in the company. If they do so the Court will declare the allotment invalid and rectify the Register, and in the meantime will restrain the allottees from voting in respect of the shares thus allotted.⁵ (Directors may, however, purchase shares from existing members to increase their voting power.⁶) They must not when allotting shares to themselves make the terms or time of payment more favourable to themselves than to the general body of members.⁷ Any profit the directors make out of shares improperly allotted to themselves will belong to the company, or if they have retained the shares they will be liable for the difference between the nominal value and the market value at the time of allotment.⁸

An application for shares, followed by a communication that an allotment has been made, constitutes a contract between the applicant and the company, from which neither party is at liberty to withdraw. Care, however, should be taken that nothing is introduced into the

¹ *Per* Swinfen Eady, J., *Pereval v. Wright*, [1902] 2 Ch. 421.

² *Hilder v. Dexter*, [1902] App. Ca. at page 480.

³ *York and North Molland Railway Co. v. Hudson*, [1851] 22 L. J. Ch. 529; *Parker v. McKenna*, [1875] 10 Ch. 96; *Shaw v. Holland*, [1900] 2 Ch. 305.

⁴ *Ving v. Robertson and Woodcock, Limited*, [1912] 56 S. J. 412.

⁵ *Fraser v. Whalley*, [1864] 2 H. & M. 10; *Punt v. Symons & Co.*, [1903] 2 Ch. 506; *Piercy v. S. Mills & Co.*, [1920] 1 Ch. 77.

⁶ *North-West Transportation Co. v. Bently*, [1887] 12 App. Ca. 580.

⁷ *Alexander v. Automatic Telephone Co.*, [1900] 2 Ch. 56.

⁸ *Shaw v. Holland*, [1900] 2 Ch. 305.

letter of allotment differing from the terms of the prospectus or the form of application, for in such a case the applicant may withdraw from the company, as there is no completed contract between the parties.¹ Lord Justice Cotton says, "To make a contract by letters or by offer and acceptance, what you must find is this— an offer and a simple unconditional acceptance: that is to say, an acceptance not introducing any new term. If a new term is introduced, it becomes no longer an acceptance, but a new offer, which must be accepted before there is a contract."² Thus, where a man applied for shares in a railway company and received a letter of allotment marked "not transferable," it was held there was a new term imported, and therefore there was no contract, and the applicant was allowed to repudiate his shares.³ So if the application is conditional and the allotment unconditional there is no contract.⁴ If an agreement is made that shares shall be allotted to a vendor "or his nominees" an allotment to the vendor without giving him an opportunity of making a nomination will be bad.⁵ To allot less than the number of shares applied for does not constitute a binding contract unless words in the application authorise a partial allotment⁶.

An allotment may be made conditionally (*e.g.* only so as to be effective when property is transferred to the company), in which case it will only operate when the condition is performed. Till then the allottees are not members.⁷

Where directors allotted shares on terms which were illegal (*e.g.* that they should be paid for by fees earned) it was held there was no contract and the allottee was not a shareholder.⁸

The allotment must be made within a reasonable time after application: otherwise the applicant may repudiate the shares.⁹

As in the shares of some new companies speculation runs very high, and applications are not infrequently withdrawn within a few hours after being made, the precise time of the contract being completed is very important. There are a few cases (as, for instance, where shares have been offered "firm") in which the

¹ *Barrett's Case*, [1865] 3 De G. J. & S. 30, *Addmell's Case*, [1866] 1 Eq. 225, *Howard's Case*, [1866] 1 Ch. 561, *Jackson v. Tinquand*, [1869] L. R. 4 H. L. 305.

² *Hussey v. Horne Payne*, [1878] 8 Ch. D. 670.

³ *Duke v. Andrews*, [1813] 2 Ex. 290.

⁴ *Ex parte Wood, Sunkin Vessels Recovery Co.*, [1859] 2 De G. & J. 65, 28 L. J. Ch. 890.

⁵ *National Standard Life Assurance*, [1911] 27 T. L. R. 271.

⁶ *Ex parte Roberts*, [1852] 1 Drew. 204, *re Barber*, [1852] 15 Jur. 51.

⁷ *Sputzel v. Chinese Corporation*, [1890] 80 L. T. 317.

⁸ *Pellatt's Case*, [1867] 2 Ch. 527, *National House Property Co. v. Watson*, [1908] S. C. 888, *Court of Sess.*

⁹ *Ramsgate Victoria Hotel v. Montchore*, [1866] L. R. 1 Ex. 100; *ex parte Bailey*, [1868] 5 Eq. 428, 3 Ch. 592, *Ritso's Case*, [1877] 4 Ch. D. at page 778.

application makes the contract complete, and nothing further is required.¹ But in the ordinary case of an application under a prospectus the bargain is not complete until the offer contained in the application is accepted by an allotment being made by the directors and the acceptance communicated to the applicant.

Until the bargain is thus complete the applicant may withdraw, either by a notice in writing or by an oral communication, or even by conduct showing that the offer to take shares is withdrawn,² and notice of withdrawal may be given orally to a clerk in the registered office of the company if the secretary is absent.³ If the directors know that an applicant has declared he will have nothing more to do with the company they cannot validly allot, although the applicant has not himself communicated the fact that he withdraws.⁴ But it has been said that if an invalid allotment is made, and subsequently confirmed, this is binding, although the application has meanwhile *i.e.* before confirmation--been withdrawn.⁵ The communication of the acceptance of the offer may be either oral, by writing, or by conduct.⁶ It need hardly be stated, however, that it is always most desirable to have writing in such a matter.

Under ordinary circumstances an applicant is deemed to authorise the allotment to be communicated by post, and in such a case the communication is considered to be made at the moment of posting the letter of allotment,⁷ even though the letter never reaches the applicant. But the handing of a letter to the postman to post is not of itself a sufficient posting.⁸ The withdrawal of an offer or application is effective only as at the time when it reaches the company, and not as at the time of posting.⁹ If, however, the application is made with a condition, the contract is not complete till the condition is fulfilled,

¹ See Metropolitan Fire Insurance Co., *Wallace's Case*, [1900] 2 Ch. 671, where it was held that in a reconstruction a letter from a member of the old company demanding his due proportion of shares was an offer and not an acceptance, and therefore might be withdrawn.

² *Wilson's Case*, [1869] 20 L. T. 902, *Dickinson v. Dodds*, [1876] 2 Ch. D. 463.

³ *Truman's Case*, [1894] 3 Ch. 272.

⁴ *Per Warrington, J.*, in *re Amusements Syndicate*, 2nd December, 1900, following *Dickinson v. Dodds*, [1876] 2 Ch. D. 463.

⁵ *Badman and Bosanquet's Case*, [1890] 45 Ch. D. 16. Compare *Bolton Partners v. Lambert*, [1889] 41 Ch. D. 205. This is, however, open to doubt.

⁶ *Crawley's Case*, [1869] 4 Ch. 322.

⁷ *Household Fire Insurance Co. v. Grant*, [1879] 4 Ex. D. 216. Lord Herschell expresses the rule thus: "Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted" (*Henthorn v. Fraser*, [1892] 2 Ch. at page 33, see also *Bruce v. Moore*, [1904] 1 Ch. at page 316).

⁸ *London and Northern Bank*, [1900] 1 Ch. 220.

⁹ *Henthorn v. Fraser*, [1892] 2 Ch. 27.

or until the applicant has waived the condition by accepting the allotment unconditionally.¹

An allotment made upon an application signed in a false name constitutes a good contract if the applicant intended to get the benefit of the shares, and he will be put on the list of contributories in his true name²; but it will be otherwise if the application was not intended to be acted upon, as in a case in which the application was sent in in order to increase the supposed number of shares applied for.³

Shares may be allotted to two or more persons jointly, and since 1899 one of such joint holders may be a corporation (The Bodies Corporate (Joint Tenancy) Act, 1899, 62 & 63 Vict., Ch. 20).⁴

A corporation might always be the sole allottee or sole holder of shares.

Allotments are not necessarily all made at once. Fresh applications may be received and fresh allotments made as long as there are any shares unissued.

If shares are applied for by minors, the directors should not allot, for a minor can at any time before, or upon attaining, full age repudiate the transaction. He cannot, however, merely on the ground of infancy require repayment of the amounts paid.⁵ If a married woman applies, the directors may reasonably require that the shares shall be fully paid up before allotment, or that the husband shall become a joint holder. The husband of a woman married before the date of the commencement of The Married Women's Property Acts, 1881 (Scotland), and 1882 (England), respectively, is liable during the continuance of the marriage for calls on shares acquired by her before those Acts came into force (Section 128). As from the date of the commencement of The Married Women's Property Act, 1882, all shares which after the commencement of that Act shall be "allotted to or placed, registered, or transferred in or into or made to stand in the sole name of any married woman shall be deemed, unless and until the contrary be shown, to be her separate property" (Section 7); but a company is not bound to admit a married woman to be a holder of shares or stock to which any liability attaches if its Articles of Association authorise the rejection of transfers to such a person.

¹ *Suhlgreen and Curral*, [1868] 16 W. R. 121, *Pellatt's Case*, [1867] 2 Ch. 527, *ex parte* Wood, *National Equitable Society*, [1873] 15 Eq. 236, *ex parte* Simpson, [1869] 4 Ch. 184; *Rogers's Case*, [1868] 3 Ch. 633. As to waiver of condition see *Rankin v. Hop and Malt Exchange*, [1869] 20 L. T. 207.

² *Savigny's Case*, [1869] W. N. 1.

³ *Coventry's Case*, [1861] 1 Ch. 202.

⁴ Before the Act a corporation could not hold in joint tenancy (*Law Guarantee Society v. Bank of England*, [1890] 24 Q. B. D. 408).

⁵ See pages 35 and 89, *supra*. *Steinberg v. Scala* (Leeds), [1873] 2 Ch. 452, overruling *Hamilton v. Vaughan Sherrin & Co.*, [1864] 3 Ch. 540.

On the issue of new shares by a company already doing business an offer is often made to the existing members of a due proportion of the new shares; in such a case the acceptance by the member completes the contract to take the shares, and no allotment is necessary. Sometimes the offer is coupled with a right for the member to renounce them in favour of a third party. In this case there should be a letter of renunciation signed by the member and an application for the shares signed by the person taking them. The directors cannot refuse to accept the person in whose favour the renunciation is made, relying upon an Article entitling them to reject transfers.¹ An Article may, however, be so drawn as to justify such a refusal, but this is not usual.

The letter of allotment must be *impressed* with a penny stamp if the shares allotted do not amount to five pounds in nominal value, or a sixpenny stamp if they amount to that sum² (Finance Act, 1899, Section 9), and "every person who executes, grants, issues, or delivers out any document chargeable with duty as a letter of allotment, before the same is duly stamped, shall incur a fine of twenty pounds" (Stamp Act, 1891, Section 79). But the contract is not less binding when the letter of allotment is unstamped.³

A letter of allotment is generally to the following effect:—

SIR,—In reply to your application for shares, I am instructed to inform you that the directors have allotted you shares of £ each in this company, and I have to request that, on or before the day of , you will pay to the bankers of the company [*here give the name and address of the bankers*] the sum of £ , being the amount of per share on the shares so allotted.

Your obedient servant,

To _____

Secretary.

N.B.—Please keep this letter of allotment and the receipt for the amount payable as above until the share certificates are ready to be exchanged therefor, of which notice will be given in due course.

Usually certain amounts are made payable on application and allotment, and in the case of a public issue the amount payable on application must, where a prospectus is issued, under Section 85, Sub-section 3, be not less than five per cent., and

¹ Pool Shipping Co., Limited, [1920] 1 Ch. 251.

² The stamp is also required where the allotment is of a fractional part of a share (Revenue Act, 1900, Section 9).

³ Whitley Partners, [1886] 42 L. T. 11.

under Sub-section 7, where there is no prospectus, at least this amount must be paid up before allotment. The sums payable on application and allotment are not "calls," but are payable under the express contract constituted by the terms of allotment; if the Articles contain a provision that these amounts shall be paid Section 14, Sub-section 2, constitutes them in England and Ireland a specialty debt. Unless otherwise expressly stated (as, for instance, when part is a premium) these sums when paid go in satisfaction of the amounts payable on the shares.¹ It is a breach of duty for directors to issue shares to themselves and their friends on more favourable terms as to payment than those offered to the public, unless the latter are expressly informed of the arrangement.¹

It is a convenient plan to have the letter of allotment, with a form of secretary's or bankers' receipt for the amount to be paid on allotment, and a counterfoil containing the necessary particulars, bound up in a book. On the letters of allotment and the receipt forms being detached, the counterfoil remains in the book, and the particulars may in due course be posted in the Register of Members without much trouble. Otherwise a Register of Applications and Allotments should be kept, in which all applications are entered as they come in, and the allotments as they are made or sent out, with dates, amounts paid, and other necessary particulars.

Allotments once made and communicated cannot be cancelled,² although under certain circumstances the shares may be forfeited, or, in some cases, the Register rectified by striking out the names of persons who complain of being wrongly included.³

Whenever a Company Limited by Shares makes any allotment of its shares, either upon public subscription or otherwise, it must within one month thereafter file with the Registrar—(1) a Return of the Allotments, stating the number and nominal amount of the shares comprised in the allotments, the names, addresses, and descriptions of the allottees, and the amounts (if any) paid or due and payable on each share; and (2) when shares are allotted in whole or in part for a consideration other than cash, proper contracts in writing constituting the title of the allottees to their allotments, together with any contract of sale or for services or other consideration in respect of which the allotment was made (as to which see page 197, *infra*), and a Return stating the number and nominal amount of the shares so allotted, the

¹ *Alexander v. Automatic Telephone Co.*, [1900] 2 Ch. 56.

² *Duff's Executors' Case*, [1896] 32 Ch. D. 301; compare *Hall's Case*, [1870] 5 Ch. 707.

³ See "*Rectification of the Register*," page 95, *supra*, and "*Forfeiture, Surrender, and Disclaimer of Shares*," page 134, *infra*.

extent to which they are to be treated as paid up, and the consideration for which they have been allotted (Section 88, Sub-section 1). In the absence of a contract in writing, a document containing the prescribed particulars must be stamped with the same stamp as if it were a contract for the purpose, and must be filed (Section 88, Sub-section 2). If default is made in filing the contract or particulars, a penalty of fifty pounds a day may be imposed on every director, manager, secretary, or other officer of the company who is knowingly a party to the default; but the Court may grant relief and extend the time for filing if the omission was accidental or due to inadvertence or if it is equitable to grant relief (Section 88, Sub-section 3).

Small companies frequently make allotments of shares from time to time, often of small amounts. The officers of such companies should bear in mind that a Return must be made of every such allotment, however small.

SHARE CERTIFICATES.

As soon as conveniently may be after allotment the share certificates should be prepared, and notice sent to the shareholders that they are ready to be exchanged for the letters of allotment, receipts for deposit, &c. In the case of companies applying for a quotation in the Stock Exchange Official List the form of the share certificate must be approved by the Committee before a settlement or quotation will be granted.

Section 92 requires every company—unless the conditions of issue otherwise provide—to complete and have ready for delivery the certificates of shares within two months after allotment or registration of any transfer of shares under penalty of five pounds a day during the time the default continues, which penalty attaches to the company and every director, manager, secretary, or other officer knowingly a party to the default.¹ If it is not intended to issue the share certificates till the shares are fully paid, this must be provided for by the “conditions of issue,” as in any case some allottees may be more than two months in making their payments.

When a company has a share capital it must distinguish each share by its appropriate number (Section 22), and the Articles almost invariably give to each member a right, free of charge, to a first certificate or certificates indicating the share or shares to which he is entitled. The usual and more convenient practice is to include in one certificate all the shares held by a member; but sometimes, where the shares are of large amount, a separate

¹ The same provisions apply to debentures and certificates of debenture stock.

certificate is issued for each share. The Articles also generally state how such a certificate is to be signed, the most usual provision being that it shall be signed by two directors, countersigned by the secretary, and impressed with the seal of the company.

The company must not enter on the certificate any memorandum that it has a lien on the shares.¹

A certificate under the seal of the company is *prima facie* evidence of the title of the person named to the shares (Section 23), but it does not give the person an absolute, or, as it is called, an indefeasible, right to the shares. If it can be shown that the holder obtained the shares from some person who could not give him a title to them, the name of the true owner will be retained upon or restored to the Register, and the holder lose the shares. But if the holder acquired the shares in good faith, having given value for them, relying upon an untrue certificate issued by the company, the company will be estopped from denying his title to the shares which he was induced to buy or pay for by being shown the certificate.² This, however, gives the holder only a right to damages against the company, and not to the shares as against the true owner;³ and if the certificate is a forgery the company comes under no liability, even when the forgery was the act of its secretary⁴; also if the certificate is in fact correct, stating that a certain person is the registered holder of the shares, the company will not be liable to a purchaser from him by reason of such holder having meantime transferred the shares, even though the company has parted with the certificate after knowing of the sale of the shares.⁵

The certificate, moreover, only shows the legal title to the shares, and accordingly, if the person who relies upon the certificate, made out in the name of the person selling to him, does not get his title made complete by taking a transfer into his own name, and procuring himself to be registered as holder of the shares, he may find that a previous equitable title (as, for instance, a mortgage) stands in his way.⁶ Thus, where a debtor assigned all his property to trustees for his creditors, but retained his share certificates, and subsequently sold the shares to a purchaser for value, the title of the trustees who had given notice to the company prevailed⁷; and if the owner has executed

¹ W. Key & Son, [1902] 1 Ch. 467.

² Bahia and San Francisco Railway Co., [1868] L. R. 3 Q. B. 584, Balkis Consolidated Co. v. Tomkinson, [1893] App. Ca. 396, Ottos Koppe Diamond Mines, [1893] 1 Ch. 618.

³ Hart v. Frontino Co., [1870] L. R. 5 Ex. 111, and see Note on page 186, *infra*.

⁴ Ruben v. Great Fingull Consolidated, [1904] 2 K. R. 712, [1906] App. Ca. 439.

⁵ Longman v. Bath Electric Tramways, [1905] 1 Ch. 646.

⁶ Shropshire Union Railway v. The Queen, [1876] L. R. 7 H. L. 496; Moore v. North-Western Bank, [1891] 2 Ch. 509; Kelly v. Munster and Leinster Bank, [1891] 29 L. R. Ir. 19.

⁷ Peat v. Clayton, [1906] 1 Ch. 650.

a blank transfer endorsed on the certificate and left it with a broker who wrongfully pledges it, the owner's title will be postponed to that of the pledgee.¹ But if the purchaser has completed his legal title by being registered as the holder of the shares, he will not be affected by any equitable rights of which he did not know at the time he bought the shares. The statement usually contained in a certificate that no transfer will be registered without production of the certificate does not render the company liable for any loss which may arise to a person holding the certificate from a transfer being completed without its production,² so that even a deposit of the certificate with a blank transfer may fail to protect a lender.

A deposit of a share certificate without transfer or memorandum will constitute an equitable mortgage of the shares.³

By The Forged Transfers Acts, 1891 and 1892, a company is authorised to make compensation for losses arising through transfers being forged, and to charge a fee, not exceeding one shilling per hundred pounds, to meet any such claims; but these Acts are not compulsory, and a company can adopt them or not as it pleases. Very few companies, except the large railway companies, have adopted them.

Forms differing in appearance (*e.g.* in colour or size) should be used for preference, ordinary, and deferred shares. It is convenient also to state on the certificate the respective rights of holders of different classes of shares, and the certificate ought always to state how much is paid up on each share. Where capital is reduced or calls have been made and paid on shares after the issue of the certificates, the certificates should be called in and either endorsed with a statement of the altered facts or new certificates issued.

A share certificate does not attract any stamp duty.

A scrip certificate is not the same thing as a share certificate: indeed, it much more nearly corresponds to a letter of allotment. It is generally used where instalments upon shares are payable at short dates, and is given as an acknowledgment that the person named is entitled to be treated as the allottee of the shares mentioned, and that if he or his assigns pay the instalments they will be entitled to a share certificate and to the full rights of membership. Scrip certificates for shares are not much used in England, as if an allotment is made at all the allottee becomes at once a member, and there is no reason why the full certificate

¹ Fuller v. Glyn, Mills, Currie & Co., [1914] 2 K. B. 168.

² Guy v. Waterlow Brothers, [1908] 25 T. L. R. 515. Compare the argument in Rainford v. James Keith and Blackman Co., [1905] 2 Ch. 147; and Longman v. Bath Electric Tramways, [1905] 1 Ch. 646.

³ Harold v. Plenty, [1901] 2 Ch. 314.

should not be issued. Scrip is more often used, however, for debentures, as no question of membership arises, and it is usually stated on the scrip that if the remaining instalments are paid the debentures will be issued, but if default is made the deposit will be forfeited. But such debenture scrip will usually create an equitable charge, and in that case requires registration under Section 93. A scrip certificate requires a stamp of twopence to be impressed upon it (Stamp Act, 1891, Section 79, and Finance Act, 1920, Section 35), and this is extended to scrip for a fraction of a share (Revenue Act, 1909, Section 9).

Some influential bodies have expressed a desire that share certificates should be an absolute evidence of title in the same way as are share warrants to bearer. A difficulty, however, lies in the way. If by an oversight two persons get certificates for the same shares, clearly both cannot have an indefeasible title to those shares; and if other shares are to be given by the company in place of one set, the total capital of the company would be increased to this extent, contrary to the policy of the law. The Forged Transfers Acts, 1891 and 1892, above referred to, only meet the difficulty in part, as they are not compulsory, and only relate to damages being given, and not to the certificate making an indefeasible title.

SHARE WARRANTS TO BEARER.

Section 37 provides for the issue of share warrants to bearer if the Articles of Association authorise such issue. The effect of the issue of a share warrant is to make the bearer of it absolutely entitled to the fully paid shares or stock named in it, and the ownership can accordingly be passed by mere delivery. No person purchasing a share warrant need make any inquiry as to the title of the person who sells it, any more than if he were receiving a bank note; but if the holder has in fact stolen or fraudulently obtained a share warrant, he can of course be compelled to surrender it in the same way as a thief or cheat would have to give up a bank note.

The company may provide for the payment of dividends by coupons or otherwise (Section 37, Sub-section 1). It is usual to do this by coupons attached to the warrant, each stating that the bearer is entitled to the dividend for a certain year or half year, or to the first, second, or third dividend declared, and in such case the bearer of the coupon, and not of the warrant, is entitled to the dividend.

Subject to the regulations of the company, the bearer of a share warrant can return it to the company, and be re-entered upon the Register as a shareholder, the warrant being thereupon cancelled (Sub-section 3).

The Articles of Association should provide when and upon what conditions the holder of a share warrant is to be treated as a member of the company or to give votes, and upon what terms a lost or destroyed share warrant may be replaced. The Act, however (Section 37, Sub-section 4), declares that the holding of share warrants shall not be a qualification for a director or manager in cases where the Articles require any such qualification.

On the issue of a share warrant a company must strike out of its Register the name of the original holder of the shares or stock represented, and enter particulars as to the date of issue of the warrant, and a statement of the shares or stock represented by it, distinguishing each share by its number (Section 37, Sub-section 5).

Before a share warrant is signed, sealed, or issued, it must be impressed with a stamp denoting the amount of duty with which it is chargeable, the duty being three times the amount which would be chargeable on a deed transferring the share or shares or stock specified in the warrant if the consideration for the transfer were the nominal value of such share or shares or stock (Stamp Act, 1891, Schedule I; Finance (1909-10) Act, 1910, Section 73; Finance Act, 1920, Section 36): *i.e.* whatever the market value may be, the stamp duty is three pounds per cent. on the nominal value of the shares included in the warrant.¹

Share warrants can only be issued in respect of shares fully paid up. This form of security is not in great favour in England, though very popular in France, Germany, and other European countries. The objection to them is that if stolen there is very little chance of recovering the value of the shares; for any person who has bought them in good faith is entitled to keep them and receive the dividends,² and even a person in collusion with the thief may often successfully retain them by defying the true owner to prove the collusion. On the other hand, share warrants pass very easily upon a sale, only needing to be handed over, and are a useful form of document if it is desirable from time to time to make a deposit of securities with bankers or brokers for an overdraft.

The old Table A did not, but the new Table A does, contain clauses as to the issue of share warrants.

¹ "If a share warrant is issued without being duly stamped, the company issuing the same, and also every person who, at the time when it is issued, is the managing director or secretary, or other principal officer of the company, shall incur a fine of fifty pounds" (Stamp Act, 1891, Section 107).

² *Webb, Hale & Co. v. Alexandria Water Co.*, [1905] 93 L. T. 339; *Rumball v. Metropolitan Bank*, [1876] 2 Q. B. D. 194.

Private companies cannot take power to issue share warrants, and if they adopt Table A must negative the clauses relating to them, for there must be a restriction on the right of transfer (see page 53, *supra*).

PAYMENT OF THE NOMINAL AMOUNT OF SHARES AND ISSUE OF FULLY OR PARTLY PAID SHARES.

The fact of becoming a member of a company renders the person liable to contribute to its assets to the extent and in the manner prescribed by the Memorandum and Articles of Association. Thus, in an Unlimited Company the members are liable while the company is a going concern to pay to it the nominal amount of the shares (if any) held by them as and when called up, and upon a winding up to pay whatever amount is necessary to satisfy the debts of the company and the costs of liquidation¹; but as far as possible all the members contribute rateably. In a Company Limited by Guarantee the members are liable while the company is a going concern to pay to it the amount of the shares (if any) held by them as and when called up, and on a winding up they are liable for any balance of the amount of their shares unpaid, and, in addition, the amount guaranteed by them in the Memorandum of Association, if required for the purpose of paying the debts of the company and the costs of liquidation, but no more (Section 123). In the case of a Company Limited by Shares each member is liable to pay only the nominal amount of the shares held by him.

In each of the above cases, until a liquidation takes place, the amounts are payable at the times and in the manner prescribed by the Articles of Association, which almost invariably declare that so much as is not paid at the times fixed by the prospectus or agreement to take shares may be called up by the directors as and when they think fit. Whatever amount has not been previously called up by the directors and paid to the company may be called up by the liquidator upon a winding up, or whenever he may subsequently think fit (see Book III., Chapter IV., *infra*), and this, being a statutory power of the liquidator, cannot be taken away by the Articles or by contract.

CALLS ON SHARES.

Members of a company are liable to pay up the nominal amount of their shares. Before liquidation the time and manner of payment are determined by the agreement between the company and the members, which is usually, to some extent, fixed by the terms

¹ This liability attaches to a member of an Unlimited Company whether he holds shares in it or not.

of the prospectus,¹ and, so far as the matter is not one of express agreement, depends upon the Articles of Association. Thus, subscribers to the Memorandum are not liable to pay until calls are made,² nor until calls are made is there any debt such as will bring a lien into operation,³ but persons who receive an allotment upon the terms of a prospectus are liable to pay the amounts prescribed upon application and allotment and any further instalments mentioned, the balance (if any) depending upon the calls made. Payments to be made under the terms of the prospectus are not, however, "calls" for the purpose of giving the special remedies as to forfeiture and interest unless the Articles expressly so provide.⁴

In the absence of special conditions of allotment nothing is payable till a call is made, and an arrangement that some shareholders shall hold their shares with nothing or only a small amount paid while others pay more is lawful (see Section 39); but in the absence of a special provision for different amounts being called up on shares there is *primâ facie*, by virtue of the ordinary law of partnership, an implied condition of equality between shareholders in a company, and *primâ facie* it is improper to make a call on some members of a class of shareholders without making a similar call on all members of that class,⁵ and in the case of shares offered to the public for subscription at least five per cent. must be made payable on application (Section 85, Sub-section 3). The directors must not favour themselves in this matter without the sanction of the company,⁶ and a company cannot commence business until the directors have paid as much in respect of application and allotment moneys as is payable by other members (Section 87, Sub-section 1 (b)).

When the shares in a company are not fully paid, the balance unpaid can be called up by a proper authority at any time, unless this is forbidden by the Articles or by a special resolution, and a member of the company cannot escape from his liability to pay unless he shows that he has been wrongly made a member, and has come with all diligence to have his name removed from the Register. It will not avail a member to show that the affairs of the

¹ A statement in the prospectus that no calls are anticipated will not prevent calls being made when required for the business of the company (*Accidental Insurance Co. v. Davis*, [1866] 15 L. T. 182).

² *Alexander v. Automatic Telephone Co.*, [1900] 2 Ch. 56.

³ *Russell Spratt's Patent Co.*, [1898] 2 Ch. 132.

⁴ *Crosskey v. Bank of Wales*, [1863] 4 Giff. 314.

⁵ Per Sargant, J., in *Galloway v. Halle Concerts Society*, [1915] 2 Ch. at page 239; *British and America Trustee Corporation v. Couper*, [1894] App. Ch. at page 417; *Preston v. Grand Collier Dock Co.*, [1810] 11 Sim 327.

⁶ *Alexander v. Automatic Telephone Co.*, [1900] 2 Ch. 56.

company have been badly managed, or that its property has been wasted: he is still liable to pay any calls that are regularly made.

The Act does not specify how a call is to be made, and the manner of doing it must be determined by the Articles of Association, and Section 39 enables a company, if authorised by its Articles, to make arrangements for a difference between the holders of shares in the amount of calls or the time for payment, but in the absence of such an arrangement calls must be made rateably on all shareholders.¹ In the old Table A calls are dealt with by Clauses 4 to 7, and in the new Table A by Clauses 12 to 17. Money payable in pursuance of the regulations of the company is a specialty debt in England and Ireland, and accordingly can be recovered at any time within twenty years of the date of the call. Calls made in a winding up are not subject to the limitations contained in the Articles and will be dealt with in connection with winding up (see *infra*); here only calls made while the company is carrying on its business will be considered.

By Section 59 a company may by special resolution declare that any portion of its capital not already called up shall not be capable of being called up except in the event and for the purpose of the company being wound up. A provision to that effect *in the Articles* does not by itself constitute reserve capital, and the Articles can be varied by special resolution making the amount unpaid callable at any time.² But a similar provision declared by special resolution would appear to be irrevocable, and capital which can only be called up in a winding up cannot be included in a charge given by debentures on uncalled capital.³

Table A provides that the directors may from time to time make such calls upon the members⁴ as they think fit, the old Table A requiring twenty-one, and the new Table A fourteen, days' notice to be given to the members, who are then liable to pay at the times appointed by the directors; but if such notice is not given to a member he can successfully defend an action for the call,⁵ although he cannot take advantage of the fact that other members have not received notice.⁶ Under this or a similar clause a call could only be made by a proper quorum of the directors, duly appointed and qualified, but it is provided by Section 74 that acts of directors or managers shall be valid notwithstanding that any defect in their appointment or qualification may be afterwards

¹ See page 189.

² *Mulleon v. National Insurance Co.*, [1891] 1 Ch. 200.

³ *Bartlett v. Mayfair Property Co.*, [1898] 2 Ch. 28.

⁴ Note that a person (other than a subscriber to the Memorandum) is not a member until his name is entered in the Register. It would seem therefore that until so entered he cannot be sued for a call.

⁵ *Watson v. Eales*, [1856] 29 Beav. 291.

⁶ *Newry & Enniskillen Railway v. Edmunds* [1818] 2 Ex. 118.

discovered. This means the subsequent discovery of the defect, not of the facts giving rise to it.¹ A call irregularly made can be confirmed at a meeting where there is no irregularity.² Where the resolution making a call does not state the time and place of payment the call cannot be enforced.³

Clause 12 of the new Table A provides that no call shall exceed one fourth of the amount of the share, but this does not prevent two calls being made on the same day of the full amount if they are payable with a sufficient interval between them.⁴

The directors are the proper judges whether a call is necessary, and Courts of Law will not interfere with their discretion⁵ unless it clearly appears that the call is for an object not within the powers of the company.⁶ The powers of the directors are, however, fiduciary, and must be used, not for some purpose of their own, but for the benefit of the shareholders.⁷ They are not, however, trustees for the creditors, and if they exercise their powers for the benefit of the company the creditors cannot complain.⁸ The directors must not make any arrangement by which other persons are liable for calls, but they themselves are not, unless the company knows of and sanctions the arrangement.⁹ Nor must they make calls on some of the shareholders to the exclusion of others¹⁰ unless arrangements have been made, under provisions in the Articles in accordance with Section 39 enabling the company to make differences between the holders of shares in the amount of calls to be paid and the time of payment.

A call made after the death of a member is payable out of his estate.¹¹

If a member become bankrupt, the company may prove, not only for calls actually made, but also for the estimated amount of future calls¹²; but the payment of a dividend in the bankruptcy is

¹ *Dawson v. African Consolidated Co.*, [1898] 1 Ch. 6; *British Asbestos Co. v. Boyd*, [1903] 2 Ch. 439. The Companies Clauses Act, 1845, contains a similar provision, see *Channell Collieries Trust v. Dover Railway Co.*, [1911] 2 Ch. 506.

² *Austin's Case*, [1871] 21 L. T. 932.

³ *Cawley & Co.*, [1889] 42 Ch. D. 209. From page 236 it appears that this does not depend on the terms of the Articles.

⁴ *Universal Corporation v. Hughes*, [1900] S. C. 1134, Court of Sess.

⁵ *Buley v. Birkenhead Railway Co.*, [1850] 12 Beav. 433, *Odessa Tramways v. Mendel*, [1878] 8 Ch. D. 235.

⁶ *Const v. Harris*, [1824] Turn. & R. 496, *Natusch v. Irving*, [1821] 2 Coop. C. C. 358.

⁷ *Gilbert's Case*, [1870] 6 Ch. 559, *Sykes' Case*, [1872] 13 Eq. 255.

⁸ *Pool's Case*, [1878] 9 Ch. D. 322.

⁹ *Alexander v. Automatic Telephone Co.*, [1900] 2 Ch. 56.

¹⁰ *Preston v. Grand Collier Dock Co.*, [1840] 11 Sim. 327.

¹¹ *New Zealand Gold Extraction Co. v. Peacock*, [1894] 1 Q. B. 622.

¹² *Re McMahon*, *Fuller v. McMahon*, [1900] 1 Ch. 173. An employee appointed under the seal of the company to take proceedings in bankruptcy on behalf of the company is an officer of the company within Section 149 of The Bankruptcy Act, 1914 (*in re J. G. Tomkins & Co.*, [1901] 1 K. B. 476).

not equivalent to payment of the amount for which proof is made, and in the distribution of the Company's assets the trustee in bankruptcy will only participate on the footing of what has actually been paid.¹

When shares are transferred after a call has been made and before it is paid the liability is not transferred to the transferee.² The company, however, can protect itself by refusing to register the transfer until the call is paid, and it seems can make a fresh call in respect of the same amount as long as it is unpaid.³

Clause 5 of the old Table A provides that a call shall be deemed to be made at the time the resolution of the directors is passed—not at the time when notice of the call is given. There is no similar provision in the new Table A.

Table A provides that calls in arrear shall bear interest, and in special Articles it is usual to make this at a high rate, so as, in fact, to be penal. Otherwise it might be worth while to pay interest on the calls in arrear, because the money required was earning interest elsewhere. Such an Article does not, however, apply to calls made in a liquidation.⁴

Clause 7 of the old Table A and Clause 17 of the new Table A (conformably with Section 39 of the Act) allow calls to be paid in advance, and an arrangement to be made for the advance payments to bear interest. This interest is a debt from the company, and must be paid although there are no profits out of which dividends are payable⁵; but the shareholders cannot require repayment of the capital before liquidation⁶. Trustees and others often avail themselves of this provision; but it has some disadvantages: the shares are not readily saleable on the Stock Exchange unless a very large number of shares are so paid up and a quotation obtained, and money thus paid up cannot be repaid except by the company going through the complicated process necessary for making a reduction of its capital.⁶ Money so paid in advance is repayable in a winding up before any money paid up in pursuance of calls is repaid to the members,⁷ but is postponed as regards capital to the claims of creditors.⁸

¹ *West Coast Goldfields, Limited, ex parte Rowe*, [1906] 1 Ch. 1.

² *Per Lindley, L. J.*, in *Taylor, Phillips and Rickard's Case*, [1897] 1 Ch. at page 306.

³ *New Balkis Kierstling v. Raudt Gold Mining Co.*, [1904] App. Ch. 165—a case of a call repented after forfeiture. But if the former holder pays calls even after forfeiture this will relieve the purchaser (*Raudt Gold Mining Co.*, [1904] 2 Ch. 468).

⁴ *Welsh Flannel Co.*, [1898] 20 Eq. 360.

⁵ *Lock v. Queensland Investment and Land Mortgage Co.*, [1896] App. Ch. 461.

⁶ *Lock v. Queensland Investment and Land Mortgage Co.* in C. A., [1896] 1 Ch. 307; *London & Northern Steamship Co. v. Farmer*, [1914] W. N. 200; 111 L. T. 204.

⁷ *Wakefield Rolling Stock Co.*, [1892] 3 Ch. 165.

⁸ *Exchange Drapery Co.*, [1888] 38 Ch. D. 371.

Arrangements that money lent to the company or money to be paid under a guarantee shall in the event of a winding up be treated as paid in advance of calls are invalid and do not relieve the shareholder from liability in the winding up.¹

If a compromise between various classes of shareholders is proposed, those who have paid in advance of calls form a separate class, of which a meeting should be separately called if the scheme affects their position.²

A course which is sometimes adopted is for a member to make an ordinary loan to the company on the terms that it is to be set off against any call made. This plan works very well so long as the company is a going concern; but if the company is wound up, the debt cannot be set off against calls made by the liquidator,³ and the shareholder will have to pay his calls and wait for a dividend upon his loan.

The following form of resolution of directors making a call may be used:—

RESOLVED—That a call of five shillings per share be made upon the members of the company in respect of the amount unpaid on their shares, and that the same be payable on or before the day of at the registered office of the company, and that all calls unpaid by that day shall bear interest at the rate of per centum per annum from the day when the same shall become payable until payment.

* If calls remain unpaid, the members liable should be sued for the amount. "The duty of directors when a call is made is to compel every shareholder to pay to the company the amount due from him in respect of that call, and they are guilty of a breach of their duty to the company if they do not take all reasonable means of enforcing that payment."⁴ They should equally collect any interest payable on calls in arrear, but they are not bound to waste money in suing a person who they believe cannot pay. Any dividends becoming payable upon the shares of such members should be retained by the company, and as a last resort (if the Articles give the power) the shares should be forfeited. As will be seen where Forfeiture is considered (page 434, *infra*), this will not relieve the members from liability to pay calls made prior to the forfeiture.

METHODS OF PAYMENT FOR SHARES.

Shareholders must pay for their shares in money or money's worth—that is to say, in cash, or by goods, property, services, or some other valuable consideration. *Prima facie* the payment

¹ *Burge's Case*, [1868] 5 Eq. 420; *Law Car Insurance Corporation*, [1912] 1 Ch. 405.

² *United Provident Assurance Co.*, [1910] W. N. 199.

³ *Grissell's Case*, [1866] 1 Ch. 528; *Burge's Case*, [1868] 5 Eq. 420.

⁴ *Per Lord Cranworth in Spackman v. Evans*, [1868] L. R. 3 H. L. at page 186.

must be made in cash, but a company may agree with a holder of shares to accept some other form of payment, or an existing debt may be set off against a present liability to pay calls¹: in other words the liability may be discharged by payment, set-off, accord, and satisfaction, or any release that is not *ultra vires*.

From the date when the Act of 1867 came into force (the 1st September, 1867) to the 31st December, 1900, the law was that all shares were held subject to the payment of the whole amount in cash, unless otherwise determined by a contract made in writing and filed with the Registrar on or before the issue of such shares. But Section 33 of the Act of 1900 repealed Section 25 of the Act of 1867, which contained that provision, and enacted that no proceedings under the repealed section should be commenced after the 31st December, 1900. The effect of the repeal appears to be that the holder of shares who before 1901 paid for them otherwise than in cash cannot be sued for calls merely because no contract has been filed. But there may be cases where upon a distribution of surplus assets the old law is of importance,² for there is no provision that the payment in kind before 1901 should be a valid payment. Relief can, however, still be obtained from the Court under the Act of 1898.³ The discussion of the effect of Section 25 of the Act of 1867, which was contained in earlier editions of this work, is omitted as of rare application, and a large quantity of case law becomes obsolete. The section worked great injustice, and no one laments its repeal.

The Act does not contain any provision as to how payment otherwise than in cash may be agreed or determined. Section 88, Sub-section 1 (*b*), requires a Company Limited by Shares to file with the Registrar, "in the case of shares allotted as fully or partly paid up otherwise than in cash, a contract in writing constituting the title of the allottee to the allotment, together with any contract of sale, or for services or other consideration in respect of which that allotment was made, such contracts being duly stamped," as well as "a return stating the number and nominal amount of shares so allotted, the extent to which they are to be treated as paid up, and the consideration for which they have been allotted," and for default there is a penalty of fifty pounds a day; and Sub-section 2 recognises that the contract may not be in writing, and allows particulars (bearing an equivalent stamp) to

¹ See *re E. J. Wragg, Limited*, [1897] 1 Ch. at pages 829 and 835. A release without payment in money or money's worth, or on payment of less than the full amount, would be *ultra vires*.

² *Re Brutton and Burney, Limited*, [1901] 1 Ch. 637, recognises that this difficulty may arise.

³ This Act is repealed, but The Interpretation Act, 1889, preserves its benefits in respect of matters occurring before its repeal in 1900 (*Wilkinson Sword Co.*, [1913] W. N. 27).

be filed in place of a contract: this makes it clear that a written contract is not required. There still must be some contract which must constitute "the title of the allottee": that is to say, a contract with a third party will not suffice, for this gives the allottee no title; but a contract to issue shares to a person "or his nominees" and a nomination by him will, it seems, suffice. The nomination has to be stamped, before execution, with sixpence as a letter of renunciation. It is to be observed, however, that there is no provision that the amount of the shares shall be payable in cash in the absence of such a contract, so that failure to comply with the Act may entail penalties, but not the very serious consequences to the allottee which resulted under the Act of 1867.

If a liquidator finds that a contract for the allotment of shares has not been stamped and filed, it is his duty to stamp it at the expense of the company, and file it when stamped.¹

That payment in money's worth is sufficient payment was well established in regard to cases before the Act of 1867,² and indeed the whole practice under that Act assumed that the transfer of property was a good payment if the contract was duly made and filed. Equally, the extinguishment of a debt due from the company to the shareholder is payment,³ and may be so treated even though no call has been made and no debt is therefore presently due to the company.⁴ It is not material that the company has not entered the payment in its books.⁵ Such a payment is, however, not "payment in cash,"⁶ though this is not now of much importance. Moreover, any circumstances creating a set-off,⁶ or an agreement to render services, as by becoming manager for five years, may be a good payment.⁷ "It is, however, obviously beyond the power of a limited company to release a shareholder from his obligation without payment in money or money's worth. It cannot give fully paid shares for nothing and preclude itself from requiring payment of them in money or money's worth⁸; nor can a company deprive itself of its right to future payment in cash by agreeing

¹ In *re X Company*, [1907] 2 Ch. 92.

² *Drummond's Case*, [1869] 1 Ch. 772; *Pell's Case*, [1870] 5 Ch. 11; *Baglan Hall Colliery Co.*, [1870] 5 Ch. 346; *Jones's Case*, [1871] 6 Ch.; *re E. J. Wragg, Limited*, [1897] 1 Ch. at pages 835, 837, and 838.

³ *Forbes and Judd's Case*, [1870] 5 Ch. 270, 272; *Baglan Hall Colliery Co.*, [1870] 5 Ch. 346 and 356.

⁴ *Jones Lloyd & Co.*, [1889] 41 Ch. D. 159.

⁵ *Kent's Case*, [1888] 39 Ch. D. 259.

⁶ *Spargo's Case*, [1873] 8 Ch. 407; *Larocque v. Beauchemin*, [1897] App. Ca. 358. This sufficed even under the Act of 1867.

⁷ *Re Theatrical Trust*, [1895] 1 Ch. 771.

⁸ See *re Eddystone Marine Insurance Co.*, [1893] 3 Ch. 9.

to accept future payments in some other way. It cannot substitute an action for the breach of a special agreement for a statutory action for nonpayment of calls."¹ Thus an agreement to accept the supply of goods at a future time against calls is not valid,² for that is to contract that future calls may be satisfied by damages for a breach of contract to supply the goods. But an agreement by the company to pay a sum of money at once for future services (*e.g.* the erection of a building) and to satisfy the amount by an issue of fully paid shares may be good consideration for the issue of the fully paid shares.³

The company cannot by a contract make that which is not a good consideration in law a payment for shares. Thus past services for which the company was not liable to pay could not free the shareholder from liability even under a contract to that effect⁴; and a contract to issue shares at a discount—*i.e.* for a less sum than the whole nominal amount—is of no validity.⁵ But if the consideration is in kind the Court will not inquire whether it was really of value equal to the nominal amount of the shares issued, unless the consideration was illusory or permitted of an obvious money value⁶; but the written contract goes very far to establish that the consideration is not illusory even if there is much to point to its being excessive.⁷ In fact, a company can agree to purchase property and pay for services at any price it thinks proper, and may make the payment in shares, provided that it does so honestly and not colourably, and has not been so imposed upon as to be entitled to repudiate the bargain.⁸ If it is desired to impugn the transaction, that must be done in an action to set it aside and not by seeking to treat the shares as unpaid (see cases in notes ⁶ and ⁷). The bargain must, however, represent a real valuation of the property transferred as an equivalent for the shares issued, and an agreement made in consideration of the transfer of a concession to allot to the transferor as fully paid a percentage of every future issue of shares is bad so far as regards this provision without the necessity of setting aside the whole bargain.⁹

¹ *Per* Lindley, L. J., *in re* E. J. Wragg, Limited, [1897] 1 Ch. at page 820, *Pellatt's Case*, [1897] 2 Ch. 532.

² *Pellatt's Case*, [1897] 2 Ch. 527; *ex parte* Clark, [1860] 7 Eq. 550.

³ *Gardner v. Iredale*, [1912] 1 Ch. 700.

⁴ See *re* Eddystone Marine Insurance Co., [1893] 3 Ch. 9.

⁵ See page 198, *infra*.

⁶ *Theatrical Trust*, [1895] 1 Ch. 771; *Almada and Tinto Co.*, [1888] 38 Ch. D. at page 423; *re* E. J. Wragg, Limited, [1897] 1 Ch. 706. *Oregon Gold Mining Co. v. Roper*, [1892] App. Ch. 125.

⁷ *Re Innes & Co.*, [1903] 2 Ch. 254.

⁸ *Re* E. J. Wragg, Limited, [1897] 1 Ch. 706; *Felix Hadley & Co. v. Hadley*, [1897] 76 L. T. 161.

⁹ *Hong Kong and China Gas Co. v. Glen* [1914] 1 Ch. 527.

If a person has come under an obligation to take shares, either by signing the Memorandum or by agreement, he must pay for them in money or money's worth, and cannot satisfy his liability by receiving an allotment of fully paid shares to which some other person is entitled¹; but if he takes an assignment of a debt of the company to a third party, he can set that off against his liability to pay calls.²

If a winding up intervenes, a person who is liable for calls cannot set off against them a debt from the company to himself,³ and shareholders should therefore bear in mind that future calls are not extinguished by an indebtedness of the company, for the set-off will not arise until the calls are made and are presently payable.

By Section 88 "a contract in writing constituting the title of the allottee" to an allotment of fully or partly paid shares for a consideration other than cash is to be filed within a month, as well as the contract for sale &c. in respect of which the allotment was made. Therefore the best course is to have the contract executed in duplicate, in order that one part may be registered and the other retained. However, if the original is registered, a copy duly certified by the Registrar or an Assistant Registrar will be received in evidence as of equal validity with the original document (Section 243, Sub-section 7).

A contract made with a trustee for the company is not binding on the company unless a new contract is made after incorporation,⁴ and accordingly, although it was held under the Act of 1867 in *Hartley's Case*⁵ (which, though discussed in the Privy Council,⁶ has not been overruled) that a contract with a trustee duly filed was a sufficient protection, the authorities may require the filing of a contract with the company itself. Under the Act of 1867 it was essential that the contract should be complete, executed by both parties, and binding on them,⁷ and neither executed as an escrow⁸ nor made with a non-existing body.⁹ It was not necessary under that Act to state in the contract the numbers of the shares allotted,¹⁰ but it is very

¹ *Migotti's Case*, [1867] 1 Eq. 238, *Forbes and Judd's Case*, [1870] 5 Ch. 270; *Bennet's Case*, [1867] 15 W. R. 1058, 16 L. T. 475; *Fraser's Case*, [1873] 28 L. T. 158, 42 L. J. Ch. 358.

² *Dent's Case*, [1873] 8 Ch. 768, 777; *Ferrao's Case*, [1874] 9 Ch. 455.

³ *Re Barrow-in-Furness Land &c. Co.*, [1880] 14 Ch. D. 400.

⁴ *Northumberland Avenue Hotel Co.*, [1886] 33 Ch. D. 16. A resolution of the Board adopting the contract will not suffice (*North Sydney Investment Co. v. Higgins*, [1899] App. Ch. 263).

⁵ *Hartley's Case*, [1875] 10 Ch. 157.

⁶ *See Smith v. Brown*, [1896] App. Ch. 614.

⁷ *New Eberhardt Co.*, [1890] 43 Ch. D. 118; *Smith v. Brown*, [1896] App. Ch. 614.

⁸ *Dalton Time Lock Co. v. Dalton*, [1892] 66 L. T. 704.

⁹ *Anglo-Colonial Syndicate*, [1891] 65 L. T. 847.

¹⁰ *Ex parte Ford*, [1885] 30 Ch. D. 153.

convenient to do so with a view to saving disputes and for the purpose of identifying the shares, and if a Stock Exchange quotation is desired it is obligatory to do so.

A company cannot issue its shares at a discount, or agree to accept less than twenty shillings in the pound in payment for them,¹ even if the shares already issued are unsaleable at par, for this is a reduction of the capital of the company. The issue of debentures at a discount with a provision that they may be exchanged at par for fully paid shares is for this reason unlawful, for the shares would be issued at a discount,² and a company cannot issue 200 £1 shares in satisfaction of a debt of £100,³ nor can it allot 200 £1 shares for 10s. each in consideration of the allottee making a loan of £100 to the company, though, as has been seen (page 196, *supra*), the Court will not inquire into the value of property purchased for shares unless it has an obvious money value. If a contract to issue shares at a discount has been made the company cannot compel the other party to accept the shares so as to come under a liability to pay the full amount in cash: that is to say, it can only compel him to fulfil his contract, which is to take partly paid shares,⁴ and even if he has accepted the shares the company cannot before liquidation compel him to pay the full amount of the shares⁵; yet if the shares have been accepted and the shareholder's name entered in the company's Register, it cannot be removed, and he is liable in a winding up at the instance of creditors, or to adjust the rights of other members, to pay for the shares in full, notwithstanding his agreement to take them at a discount.⁷ If before their names are entered on the Register of Members the recipients of the shares object, they cannot be placed on the Register; for they have only agreed to take shares which are fully or partially paid up, and those shares the company is not able to give them.⁸

On the principle that a company may be estopped from denying the truth of representations made by itself or its agents, shares which are not in fact fully paid, but in respect of which a certificate is issued that they are fully paid, coming into the

¹ *Ooregum Gold Mining Co. v. Roper*, [1892] App. Ca. 125; *Almadia and Tinto Co.*, [1898] 38 Ch. D. 415.

² *Moseley v. Koffyfountein Co.*, [1901] 2 Ch. 108.

³ *Re E. J. Wragg, Limited*, [1897] 1 Ch. at page 831.

⁴ *Re James Polkin & Co.*, [1916] W. N. 112, 85 L. T. Ch. 318, 114 L. T. 673.

⁵ *Re MacDonald, Sons & Co.*, [1894] 1 Ch. 89, 7 Rep. 322. Compare *Arnott's Case*, [1887] 36 Ch. D. 702.

⁶ *Pioneers of Mashonaland Syndicate*, [1893] 1 Ch. 731.

⁷ *Ex parte Sandys*, [1889] 42 Ch. D. 98, *Wolton v. Saffery*, [1897] App. Ca. 209; *Pioneers of Mashonaland Syndicate*, [1893] 1 Ch. 731.

⁸ *Re MacDonald, Sons & Co.*, [1894] 1 Ch. 89, 7 Rep. 322.

hands of persons who are not aware that they were improperly issued, will be treated as if fully paid,¹ and this even though they have subsequently been bought back by some person who knows all the facts²; and the transferees of vendors' shares the certificates of which did not state that they were fully paid, but which were declared to be fully paid by a letter accompanying the certificates, escaped liability.³ Even a director may be protected by a certificate, signed by himself, stating that the shares are fully paid if he acted in good faith.⁴ If the certificates bear upon them notice of the irregularity, such as having the word "Bonus" printed on them,⁵ or if the recipient has knowledge of certain facts which inform him that the shares have not been paid for in cash, he remains liable to pay the full amount.⁶ It is not enough that he *might* have or even *ought* to have known that the shares were not fully paid if the Court finds that in fact he did not.⁷

TRANSFER OF SHARES.

The original allottee of the shares of a company remains personally entitled to the benefits and subject to the obligations of the shares until he has got rid of them either (A) by transfer, (B) by death or bankruptcy, or (C) by forfeiture or surrender. The first two, which are commonly referred to as "the Transfer and Transmission of Shares," will now be dealt with. In case of transfer the transferee takes the place of the transferor, and in case of transmission the estate of the former holder takes his place as regards benefits and liabilities.

One great distinction between a general partnership and a company is that in the former the partners cannot, and in the latter the members can, transfer their shares without the consent of their co-members, unless specially forbidden by the Articles of Association.⁸ In the case of a limited partnership the consent of the general partners has to be obtained.⁹

¹ *Parbury's Case*, [1896] 1 Ch. 100; *British Farmers' Co.*, [1878] 7 Ch. D. 533; *re Concessions Trust*, [1890] 2 Ch. 757.

² *Ex parte Sandys*, [1889] 42 Ch. D. 98, *re New Chile Gold Mining Co.*, [1892] W. N. 103, 69 L. T. 15.

³ *Re MacDonald, Sons & Co.*, [1894] 1 Ch. 89, 7 Rep. 322.

⁴ *Consters, Limited*, [1911] 1 Ch. 86.

⁵ *Eddystone Marine Insurance Co. No. 2*, [1894] W. N. 30; *ex parte Bloomenthal*, [1896] 2 Ch. 525.

⁶ *Murkham and Darter's Case*, [1899] 1 Ch. 414.

⁷ *Bloomenthal v. Ford*, [1897] App. Ca. 156, in which the House of Lords came to a different conclusion on the facts from that arrived at by the Court of Appeal, but accepted the same view of the law. Lord Herschell's judgment gives a fine exposition of the law of estoppel.

⁸ *Weston's Case*, [1870] 4 Ch. 20, *Gilbert's Case* [1870] 5 Ch. 559, *Bentham Mills Spinning Co.*, [1879] 11 Ch. D. 900, *Cawley & Co.*, [1889] 42 Ch. D. 209.

⁹ *The Limited Partnerships Act, 1907, Section 6, Sub-section 5 (b).*

Shares are personal property, and may be transferred in manner provided by the Articles of the company (Section 22).¹ Accordingly, if the Articles allow it, or if the company is governed by the regulations contained in Table A (new or old), a transfer may be made by an instrument not under seal,² differing in this from companies formed under the Companies Clauses Acts, which require transfers to be by deed; but if the Articles require a transfer to be by deed the directors cannot waive the obligation.³ It is not unusual to prescribe in the Articles the form of transfer, and if this is done the form must be followed in all essential matters⁴; but if the Articles only say "The following form *may* be adopted," then any form may be used that includes the provisions stipulated by the Articles. The regulations in Table A, and the common form in Articles, prescribe that the transfer must be signed by both the transferor and the transferee. This is generally an essential point, for unless the transferee has agreed to become a shareholder he ought not to be put upon the Register of Members; but when omitted, if the transfer has been acted upon and recognised by the transferee, it will be held to be effectual.⁵ The form in the old Table A did not, but the new Table A does, require a witness to attest the transfer of shares: this should never be omitted in practice.

The transferee may be any person capable of holding shares. It sometimes happens that a transfer is made to a firm in its firm name, and, if accepted by the company and the firm name entered in the Register of Members, the partners become individually members and liable for calls⁶; but this is not a proper course to pursue, for the Act requires the names of the members to be entered in the Register, and also the company may be placed in difficulties, not knowing whether the Partnership Articles authorise the taking of shares,⁷ nor having knowledge of the persons who constitute the firm. The company should in such a case require the transfer to be made to the partners in their individual names.⁸

¹ A provision in the Articles for a compulsory transfer of shares is not repugnant to the nature of personal property nor obnoxious to the rule against perpetuity (*Boland's Trustee v. Steel Brothers & Co.*, [1901] 1 Ch. 279), *Phillips v. Manufacturers Securities Co.*, [1917] 86 L. J. Ch. 305, 116 L. T. 290.

² *Ex parte Sargent*, [1874] 17 Eq. 273.

³ *Murray v. Bush*, [1873] L. R. 6 H. L. 50.

⁴ The omission of the address of the transferor or the denoting number of the share, if both are known to the directors and there can be no ambiguity, is immaterial and will not invalidate a transfer (*Lethby & Christopher, Limited*, [1904] 1 Ch. 815).

⁵ *Taurine Co.*, [1884] 25 Ch. D. 118; *Cunninghame v. City of Glasgow Bank*, [1879] 4 App. Ch. 697.

⁶ *Weikersheim's Case*, [1873] 8 Ch. 831, *Dunster's Case*, [1894] 3 Ch. 478.

⁷ *Niemann v. Niemann*, [1880] 43 Ch. D. 108.

⁸ *Vaghiano Anthracite Collieries*, [1910] W. N. 187.

The usual procedure is for the seller of shares to cause a transfer to be prepared, although the obligation is on the purchaser (see page 202, *infra*, and the case cited in note ¹ at foot hereof), and, having executed it, to hand it with the certificate of shares to the purchaser, who also executes the transfer and lodges it, with the certificate, at the company's office, requesting that his name may be entered on the Register in place of the seller's. If the certificate is for more shares than those sold, it is generally lodged by the seller with the company, and two new certificates are made out—one, in the name of the transferee, for the shares sold; the other, in the name of the transferor, for the balance.

The effect of a transfer has been defined as follows:—"The word 'share' does not denote rights only—it denotes obligations also; and when a member transfers his share he transfers all his rights and obligations as a shareholder as from the date of the transfer. He does not transfer his rights to dividends or bonuses already declared, nor does he transfer liabilities in respect of calls already made; but he transfers his rights to future payments and his liabilities to future calls"¹ The company will usually refuse to pass a transfer where there are unpaid calls, and even if the transfer is passed may, if the vendor fails to pay, make a fresh call for the amount unpaid on the transferee.² If, however, the transfer is preceded by a contract of sale, as in the case of purchases on the Stock Exchange, the purchaser is entitled as against the seller to all dividends declared (and it would seem is also liable for all calls made) after the contract.³ In sales on the Stock Exchange made near the time of dividend the bargain usually expresses that the sale is either *ex div.* or *cum div.*, generally written *x. d.* and *c. d.*

In the transfer the amount of the consideration must be stated and the distinctive numbers of the shares transferred, and the full names, addresses, and occupations of all the parties to the transfer should be given, but the omission of the latter particulars does not invalidate the transfer if the company has the means of supplying them.⁴ The instrument must be *impressed* with the proper stamp, showing the *ad valorem* conveyance duty,⁵ and forwarded to the company, with a request that a new certificate may be prepared and issued to the transferee. The old certificate should accompany the instrument of transfer for the purpose of being cancelled or

¹ *Per* Lindley, L. J., in *Taylor, Phillips and Rickard's Case*, [1897] 1 Ch. 305.

² *New Balkis Eersteling v. Randt Gold Mining Co.*, [1904] App. Cn. 165.

³ *Black v. Homersham*, [1879] 4 Ex. D. 24.

⁴ *Lethely & Christopher, Limited*, [1901] 1 Ch. 815.

⁵ For Table of Stamp Duties on Transfers of Shares see Appendix B. If the transfer is by way of gift the duty is now chargeable on the value of the property transferred, but if as security for a loan, or made on the appointment of new trustees, this new duty does not attach (Finance (1900-10) Act, 1910, Section 74, Sub-sections 1 and 6).

destroyed, and a new certificate issued in its place. Indeed, the Articles usually provide that unless the certificate is produced the transfer will not be passed (see new Table A, Clause 20), and a company receiving the purchase money for shares the certificate for which was, to the knowledge of the directors, in the hands of a stranger, has been held liable to pay over the amount to the actual holder, who was, in fact, mortgagee of the shares.¹ The stamp duty must be paid within thirty days after the transfer is first executed (Stamp Act, 1891, Section 15), and the secretary of the company must see that it is correctly stamped, or he is liable to a penalty of ten pounds.²

If a transfer is not properly stamped the directors may and ought to refuse to pass it, for it is in a form in which it cannot be put in evidence,³ but if it is passed, being apparently properly stamped, and the transferee is registered as the holder of the shares an objection taken subsequently will not affect the transferee's title.⁴

As a general rule the obligation to prepare the transfer is on the purchaser;⁵ and as between vendor and purchaser the stamp duty is by custom payable by the purchaser, and by the custom of the Stock Exchange the purchase price is payable on the delivery of the transfer and certificate, and the vendor is entitled to keep the purchase money, even though the transfer is subsequently not passed by the directors of the company,⁶ for the vendor does not warrant that the purchaser will be accepted. If the certificate contains more shares than those transferred, a "certificated transfer"—i.e. a transfer with a certificate upon it that the certificate has been lodged with the company—is used in place of the certificate of shares (see page 218, *infra*).

Upon receipt of a transfer the secretary should first satisfy himself that the instrument is properly executed and bears the requisite stamp,⁷ and is correct in other particulars, such as the

¹ *Ramford v. James Keith and Blackman Co.*, [1905] 2 Ch. 147.

² "If any person whose office it is to enrol, register, or enter in or upon any rolls, books, or records any instrument chargeable with duty, enrolls, registers, or enters any such instrument not being duly stamped, he shall incur a fine of ten pounds" (Stamp Act, 1891, Section 17). It is suggested that this is only if he knows of the insufficiency of the stamp, and if the Articles do not require that the transfer itself should be registered it is doubtful whether these words apply to an officer merely entering the name of the transferee in the Register of Members. These points were raised, but not decided, in *Maynard v. Consolidated Kent Collieries*, [1903] 2 K. B. 121.

³ *Maynard v. Consolidated Kent Collieries*, [1903] 2 K. B. 121.

⁴ *Indo China Steam Navigation Co.*, [1917] 2 Ch. 100.

⁵ *Birkett v. Cowper Coles*, [1919] 35 T. L. R. 298.

⁶ *London Founders' Association v. Clarke*, [1889] 20 Q. B. D. 576.

⁷ See notes ² and ³, *supra*. In case of gifts the opinion of the Commissioners should be obtained (Finance (1909-10) Act, 1910, Section 74, Sub-section 2).

aggregate and distinctive numbers of the shares, and that the transferor is the registered holder of the shares expressed to be transferred. This is the secretary's duty, and if he is a responsible person the directors are not personally liable if they accept his investigations as sufficient.¹

Section 92 requires the company to have the new certificate complete and ready for delivery within two months after the registration of any transfer (see page 183, *supra*).

Before issuing the new certificate to the transferee the secretary should, for the company's protection, send some such notice as the following to the transferor:—

SIR,—I have to inform you that an instrument of transfer, purporting to be signed by you, transferring _____ shares in this company to _____, has been lodged, and unless I hear from you to the contrary per return of post the said shares will in due course be registered in the name of the transferee.²

If the transfer is executed under a power of attorney the secretary should require production of the power. Secretaries frequently require a fee of half-a-crown for registering the power, but if the Articles do not expressly authorise such a charge there is no justification for making it.

If the transfer is in order, and no objection is received from the reputed transferor, the secretary should bring the document before the directors at the next board meeting.

When brought before the board, if the shares are not fully paid, it is the business of the directors, where they have power to refuse transfers, to see that the transferee is a person capable of accepting the transfer and one who may reasonably be expected to be able to pay any calls that may be made. They should reject any transfer to an infant (see page 89, *supra*) or person known to be of unsound mind, but if the shares are fully paid and the transferor is not indebted to the company, a transfer, properly executed and stamped and made to a competent person, should be registered at once, except in cases where the directors are empowered to reject transfers to persons whom they do not approve, and if not so registered the Court will, upon application under Section 32, rectify the Register, if necessary treating this as done at the time when the directors ought to have done it, as, for instance, making the registration operate as if effected before the liquidation, so as to relieve the transferor

¹ *Dixon v. Kennaway*, [1900] 1 Ch. 833.

² Even the sending of this notice does not protect the company in case of their acting upon a forged transfer (*Barton v. London and North-Western Railway Co.*, [1890] 21 Q. B. D. 77).

from being placed on the list of contributories,¹ or to enable him to dissent from a scheme of reconstruction,² or to relieve him from a call made after the transfer,³ and the directors cannot by delaying registration enable the company to take a lien which would defeat the transfer.⁴ These results follow from the principle that the right to transfer is implied by law except in so far as it is expressly limited by the Articles.

If the directors know that a transfer is made in breach of trust or in fraud of a person having equitable rights, they should not pass the transfer without notifying the person interested, and if they do pass the transfer they may come under a personal liability, although the company is not liable, being protected by Section 27,⁵ which forbids notices of trust being entered in the Register. Where after executing a transfer one of the transferors gave the company notice not to register it, Eve, J., held that it was the directors' duty to give the transferor notice that unless he took proceedings they would register the transfer, and where they had not done so ordered the company to register the transfer.⁶

Where a transfer has been passed by mistake, and the transferee's name entered in the Register, this may be corrected by the company, and the Register amended.⁷ If the transferee proves not to be a responsible person, the Court will not rectify the Register by inserting his name, even though the board has delayed for a long time to make inquiries.⁸

A shareholder has *prima facie* a right to transfer his shares when and to whom he pleases, but this right may be limited by the Articles, and it is common to find in the case of partly paid shares a right for the directors to reject transfers to persons whom they do not consider to be responsible, and, even in the case of fully paid shares, transfers to persons of whom they do not approve as being fit persons to be members of the company. In private companies it is required that some such restriction should be contained in the Articles, and it is not unusual to insert clauses in the Articles of such a company requiring a member to offer his shares to his fellow members before selling or transferring to strangers. These restrictions are valid, and the directors have a duty to consider transfers brought before them

¹ *Nation's Case*, [1866] 3 Eq. 77, *Lowe's Case*, [1870] 9 Eq. 589, *Joint Stock Discount Co.*, [1869] 4 Ch. 769, note.

² *Sussex Brick Co.*, [1904] 1 Ch. 598.

³ *Cawley & Co.*, [1889] 42 Ch. D. 209.

⁴ *McArthur, Limited, v. Gulf Line*, [1909] S. C. 732, Court of Sess.

⁵ *Société Générale v. Tramways Union*, [1885] 14 Q. B. D. 424.

⁶ *Grundy v. Briggs*, [1910] 1 Ch. 444.

⁷ *Anderson's Case*, [1868] 8 Eq. 509, *cf.* *Indo China Steam Navigation Co.*, [1917] 2 Ch. 100.

⁸ *Shipman's Case*, [1868] 5 Eq. 219.

in the light of the powers conferred on them by the Articles. The Article must be construed strictly; a power to refuse transfers does not entitle the directors to refuse to accept an executor who derives his title under the will of a deceased member,¹ or where new shares are being issued to members with a right to renounce the shares in favour of a third party to refuse to accept the person duly nominated.²

If the directors *bona fide* exercise their discretion to refuse a transfer within the powers given to them, the Court will not override their decision, or even compel them to state their reasons,³ and this although their power to refuse is limited to particular grounds.⁴ But if there is evidence that the directors have not properly performed their duties or have acted from improper motives the Court may controvert their discretion and order the registration of the transfer.⁴ If the directors' power is expressed to be a right to refuse to register a transfer to a person of whom they shall not approve their objection must be something personal to the transferee, for instance, that he cannot pay calls, or is a quarrelsome person, or is acting in the interests of a rival business, and if their refusal is on the ground of something which relates only to the transferor, such as that the transfer is made to increase his voting power, or is on the ground that the directors desire that only members of a particular family should be shareholders, or that there should not be a number of small holdings, this is an abuse of the power, and will be overridden by the Court.⁵ The directors must not act upon undertakings or promises given to intending purchasers, but must exercise an unfettered discretion.⁶ The test of the Court's right to interfere is whether the refusal of the directors to pass a transfer is upon grounds on which the power is given to the directors. A refusal to allow a transfer to anyone at all would be evidence that the directors were abusing their powers,⁷ unless the company is known to the directors to be on the point of suspending payment, when they may properly reject all transfers.⁸ If a director refuses to attend a directors' meeting to pass transfers and so makes it impossible to form a quorum,

¹ Bentham Mills Spinning Company, [1879] 11 Ch. D. 900.

² Pool Shipping Company, [1920] 1 Ch. 251.

³ *Ex parte Penney*, [1873] 8 Ch. 446.

⁴ Coalport China Co., [1896] 2 Ch. 404.

⁵ *Re Bell Brothers*, [1891] 65 L. T. 245; *Bede Steam Shipping Co.*, [1917] 1 Ch. 123. In the latter case Scrutton, J. J., dissented and expressed disapproval of some of the statements of Chitty, J., in *Bell Brothers*.

⁶ *Clark v. Workman*, [1920] 1 I. R. 107.

⁷ *London, Birmingham & Co. Bank*, [1865] 34 Beav. 332, *Poole v. Middleton*, [1861] 20 Beav. 646; *Robinson v. Chartered Bank*, [1865] 1 Eq. 32; *ex parte Penney*, [1873] 8 Ch. 446.

⁸ *Alexander Mitchell's Case*, [1879] 4 App. Cas. 548 *Nelson Mitchell v. City of Glasgow Bank*, [1879] 4 App. Cas. 624.

the Court, on being satisfied that the transfers would be passed if a meeting was held, will rectify the Register.¹ The fact that the transferee is already a member of the company does not prevent the directors from refusing to pass a transfer to him of further shares.² Shares are frequently acquired with a view to obtaining the control of the company; *prima facie* there is no objection to such a course, but it has been held in Ireland that the transfer of a controlling interest is not a matter of mere internal management and may in a proper case be restrained.³

The power to reject transfers is a trust to be exercised for the benefit of the company⁴; and if the Articles give the company a lien on the shares of members indebted to it, the directors should refuse to register a transfer of shares subject to the lien till the debt is paid: otherwise the company loses its security.⁵

If the Articles are silent, however, the directors cannot refuse to register a transfer, and the directors themselves have the same right as other members to transfer their shares even with the object of escaping liability,⁶ subject to becoming disqualified if they do not retain sufficient shares. When there is no express power of rejection the fact that the transferee of fully paid shares is bankrupt, so that the shares will pass to his trustee, is not alone sufficient cause for rejecting a transfer,⁷ nor the fact that the transfer is made with an indirect motive, as to increase the voting power of the transferor,⁸ or even if it be made to a pauper with a view of the transferor escaping further liability upon his shares,⁹ or is made to a person of small means as trustee for the real purchaser¹⁰; but in the *Stannaries* a transfer to a pauper is forbidden and treated as fraudulent.¹¹

If, however, a transfer is only colourable,¹² or is made with some reservation of rights to or liabilities by the transferor,¹³

¹ Copal Varnish Co., [1917] 2 Ch. 319.

² Dublin North City Milling Co., [1909] 1 Ir. R. 179.

³ Clark v. Workman, [1920] 1 L. R. 107.

⁴ Bennett's Case, [1854] 5 De G. M. & G. 284.

⁵ Bank of Africa v. Salisbury Gold Co., [1892] App. Ca. 281.

⁶ Gilbert's Case, [1870] 5 Ch. 550; Cawley & Co., [1889] 42 Ch. D. 209.

⁷ Sutton v. English and Colonial Produce Co., [1902] 2 Ch. 502.

⁸ Moffatt v. Farquhar, [1878] 7 Ch. D. 591.

⁹ De Pass's Case, [1859] 4 De G. & J. 544; Reg. v. Lambourn Valley Railway, [1888] 22 Q. B. D. 165; Masters' Case, [1872] 7 Ch. 294.

¹⁰ King's Case, [1871] 6 Ch. 196; Massey and Griffin's Case, [1907] 1 Ch. 582.

¹¹ *Stannaries Act*, 1869, Section 36.

¹² Hynn's Case, [1800] 1 De G. F. & J. 75; Budd's Case, [1861] 3 De G. F. & J. 207.

¹³ Bullie's Case, [1870] 30 L. J. Ch. 391; Chinnock's Case, [1800] Joh. 714.

it can be refused or subsequently set aside as void, as may be done if the transfer is to a person not capable of accepting it: *e.g.* an infant.¹ Equally, if the directors, having power to refuse a transfer, have been imposed upon, and so induced to accept the transferee as a shareholder, the transfer can subsequently be set aside, and the name of the transferor restored to the list of contributories.² A misdescription of the transferee is, however, unimportant if the directors have no power to reject transfers.³

The right of a shareholder to transfer his shares and the occasions when a transfer can be set aside have recently been discussed at length in the Court of Appeal and the following propositions laid down⁴:—"The regulations of the company may impose fetters upon the right of transfer. In the absence of restrictions in the Articles, a shareholder has, by virtue of the Statute (Section 22), the right to transfer his shares, without the consent of anybody, to any transferee, even though he be a man of straw, provided it is a *bonâ fide* transaction in the sense that it is an out-and-out disposal of the property, without retaining any interest in the shares.⁵ In the absence of restrictions it is competent to a transferor, notwithstanding that the company is *in extremis*, to compel registration of a transfer to a transferee not competent to meet the unpaid liability on the shares, even if the transfer be for the express purpose of relieving the transferor from liability." In the same case the following rules are laid down⁴:—"A transfer may be set aside, even though the directors have no power to reject, when it is not an out-and-out transfer, reserving to the transferor no beneficial right to the shares, direct or indirect. Whether the transfer is of this character is a question of fact.⁶ The transfer cannot be impugned merely on the ground that the transferor agrees to indemnify the transferee in whole or in part or to pay him for accepting the transfer,⁷ or on the ground that as between the transferor and the transferee the latter may have some equity (*e.g.* on the ground of misrepresentation) to have the transaction set aside, for the liquidator cannot avail himself of this.⁸

¹ *Curtis's Case*, [1868] 6 Eq. 455, *Weston's Case*, [1870] 5 Ch. 614.

² *Payne's Case*, [1860] 9 Eq. 223, *ex parte Kintren*, [1870] 5 Ch. 95; *Discoverers' Finance Corporation, Landlar's Case*, [1910] 1 Ch. 316.

³ *Bishop's Case*, [1872] 7 Ch. 296, note, *Battle's Case*, [1870] 39 L. J. Ch. 391.

⁴ *Discoverers' Finance Corporation, Landlar's Case*, [1910] 1 Ch. 316.

⁵ See *Weston's Case*, [1868] L. R. 4 Ch. 20, 27.

⁶ See *Discoverers' Finance Corporation*, [1910] 1 Ch. 318.

⁷ *Ibid.*, page 319.

⁸ *Ibid.*, page 321, disapproving a contrary opinion of Parker, J., in the same company's case, [1908] 1 Ch. 141.

If, however, the Articles contain a clause empowering the directors to reject a transferee of whom they do not approve, "the transferor cannot escape liability if he has actually by falsehood, or passively by concealment, induced the directors to pass and register a transfer (even though it be an out-and-out transfer) which if he had not so deceived or concealed they would have refused to register. Here, again, the question is one of fact. It is not sufficient to show that the transferee's address was incorrect, or that the description of his occupation was not accurate, or the like. The Court must arrive at the conclusion that therefrom resulted such a state of things as that if the directors had known the truth they would not have registered the transfer."¹ Thus to describe a man in humble circumstances as "gentleman" is not a sufficient badge of fraud.²

There is a third class of case, namely, where "a transferor has obtained the advantage of executing and registering his transfer to a man of straw upon an opportunity obtained by him fraudulently or in breach of some duty which he owed to the corporation":³ *e.g.* by procuring the postponement of the winding up so as to enable him to put his transfer through, or inducing the directors to pass his transfer in breach of their duty. In such a case also the transfer may be set aside.

Sometimes the original Articles contain provisions that in certain circumstances a member may be required to sell his shares at a price fixed in the manner set out in the Articles; these provisions are valid and can be enforced.⁴ Sometimes when there is no such Article the company proposes by special resolution to adopt a new Article imposing the obligation in question. Whether such an alteration in the Articles is lawful depends on the circumstances. The new Article will be valid if the proposal is made *bona fide* for the benefit of the company as a whole, but not if it is proposed for the benefit of the majority only or is otherwise not put forward in good faith for the benefit of the company.⁵ The cases are discussed at page 47, *supra*.

Upon a sale of shares the seller is only bound to execute a proper transfer and deliver it with the share certificate to the purchaser. He does not warrant that the company will accept the

¹ Discoverers' Finance Corporation, [1910] 1 Ch. at page 321.

² W. W. Williams' Case, [1875] 1 Ch. 576; Masters' Case, [1872] 7 Ch. 294.

³ Discoverers' Finance Corporation, [1910] 1 Ch. at page 322, Gilbert's Case, [1870] 5 Ch. 550.

⁴ Borland's Trustee v. Steel Brothers & Co., [1901] 1 Ch. 279 (sale on bankruptcy of a member), Phillips v. Manufacturers Securities, [1917] 116 L. T. 200 (sale by member infringing trade regulations).

⁵ Sidebottom v. Kershaw, Leese & Co., [1920] 1 Ch. 154, Brown v. British Abrasive Wheel Co., [1919] 1 Ch. 290; Dafen Tinsplate Co. v. Llanelly Steel Co., [1920] 2 Ch. 124.

transferee.¹ If after a sale of shares the directors, acting within their powers, refuse to pass the transfer, the transferor remains on the Register, and is liable to be put on the list of contributories in a winding up,² but he is a trustee for the transferee of all benefits and must collect and pay over to him the dividends as they accrue.³ Where a vendor purported to sell shares by their distinctive numbers and the company issued certificates bearing those numbers, but shares with those numbers were already registered in the names of third parties, it was held that there was a total failure of consideration, and the purchaser could recover the purchase money from the vendor.⁴

If a shareholder transfers shares to a person without his knowledge or authority,⁵ or to a person who cannot accept (as to an infant or lunatic),⁶ the transferor remains liable, and his name may be restored to the Register if it has been removed; so if the transfer is made with the knowledge of the transferor to a trustee for the company,⁷ but not if the transferor was ignorant that the transferee was accepting the transfer for the company.⁸

The persons who have accepted transfers of partly paid shares purchased by the company may, however, be made liable, for they have taken the shares with the liability attaching.⁹

The company usually returns a rejected transfer with a notice of its rejection, but unless the Articles direct this to be done there is no obligation to do so on the company, and silence does not amount to acquiescence in the transfer.¹⁰

If the directors, acting to the best of their judgment, approve a transfer, they will not be responsible for any loss which may arise from admitting an unsubstantial shareholder.¹¹ If they acted collusively with the person seeking to escape, it would be otherwise.

Articles of private companies frequently contain clauses requiring the members desiring to make a sale to offer their shares in the first instance to other members, sometimes even fixing the price. Such provisions are valid, and cannot be

¹ *Skinner v. City of London Marine Corporation*, [1885] 14 Q. B. D. 882.

² *Addison's Case*, [1870] 5 Ch. 294, *Symon's Case*, [1870] 5 Ch. 598, *Bell's Case*, [1870] 4 App. Ch. 563.

³ *Stevenson v. Wilson*, [1907] 8 C. 445, Court of Sess.

⁴ *Platt v. Rowe*, [1909] 26 T. L. R. 40.

⁵ *Hennessey's Executors' Case*, [1849] 2 Mac. & G. 201; *Cartmell's Case*, [1874] 9 Ch. 961.

⁶ *Curtis's Case*, [1869] 6 Eq. 455; *Wilson's Case*, [1869] 8 Fq. 240; *Weston's Case*, [1870] 5 Ch. 614.

⁷ *Addison's Case*, [1870] 5 Ch. 294, *Cross's Case*, [1869] 38 L. T. Ch. 583.

⁸ *Jessop's Case*, [1858] 2 De G. & J. 638; *Nichol's Case*, [1858] 3 De G. & J. 387; *Grady's Case*, [1863] 3 De G. J. & S. 488.

⁹ *Cree v. Somervell*, [1879] 4 App. Ch. 648.

¹⁰ *Gustard's Case*, [1868] 8 Eq. 438.

¹¹ *Faure Electric Accumulator Co.*, [1889] 40 Ch. D. 141, *Chappell's Case*, [1871] 6 Ch. 902.

impeached by the trustee in bankruptcy of a member as a contravention of his rights or as infringing the rule against perpetuities, but will be enforced by the Courts.¹ Moreover, in such a case a sham offer to the other members will not suffice: *e.g.* where a man offered his shares to his co-members at £30, but contemporaneously sold them to a friend at £11, the Court of Appeal (in an unreported case) held² that he had not complied with the provisions of the Articles of Association.

The instruments of transfer should be numbered in consecutive order, and a record of their numbers and dates made in the Register of Members against the names of the transferors. They should be retained by the company as evidence of the transaction and of the transferees having undertaken to be bound by the regulations of the company, of which the company may at any time have to give proof. A convenient method of keeping the instruments of transfer is to gum the edge and fasten them in a "guard book."

It frequently happens that a transfer of shares takes place by way of gift (as, for instance, from a husband to his wife, or from a father to his children) without any money actually passing. In such cases a formal instrument of transfer must be executed by the parties before the transaction can be registered, and a "nominal consideration" (say ten shillings) inserted in the instrument which must, however, now be impressed with an *ad valorem* stamp upon the value of the shares (Finance (1909-10) Act, 1910, Section 74).

A transfer in blank³ (*i.e.* where the name of the transferee is not filled in) is frequently given when the intention is to give a charge or mortgage upon the shares, or for other purposes. In these circumstances, where the regulations do not require that the transfer shall be by deed, there is an implied authority to the person receiving the transfer to fill in his own name or that of his nominee when the proper time comes,⁴ and an obligation on the transferor to do nothing to hinder the completion of the title of the person whose name is inserted as transferee.⁵ But if the holder improperly fills in his own name or that of another, the title to the shares does not pass; and equally if he hands the transfer still in blank to another, who fills it up, that other only

¹ *Borland's Trustee v. Steel Brothers & Co.*, [1901] 1 Ch. 279; *Attorney-General of Ireland v. Jameson*, [1904] 2 Ir. R., K. B. D. 644.

² On the same principles as guided the Court in *Manchester Ship Canal Co. v. Manchester Race Course Co.*, [1901] 2 Ch. 37.

³ Such transfers are fully discussed in *Fry v. Smellie*, [1912] 3 K. B. 282, and in *Colonial Bank v. Cudry*, [1890] 15 App. Cas. 267.

⁴ *Ex parte Sargent*, [1874] 17 Eq. 273; *France v. Clark*, [1884] 26 Ch. D. 257.

⁵ *Hooper v. Herts*, [1906] 1 Ch. 540.

has the rights which the first holder would have had: *i.e.* if the first holder be a mortgagee, the subsequent holder can only claim a mortgage on the shares; for, having received the transfer in blank, he has reason to believe that an absolute sale had not been made,¹ and this is equally the case if he had any other reason for knowing or believing that the shares were not properly transferred.² Where a transfer in blank has been used for effecting a transfer in the manner originally intended the transferor will not be allowed to set up a technical objection (*e.g.* as to the filling in of the consideration) to defeat the object for which he gave the transfer.³

On the other hand, if the holder received the shares upon a transfer which had been filled up apparently in due order, and took them for value without any notice of fraud or irregularity, and completed his title by registration, or by putting himself in a position to require immediate registration, his title is valid even against the person defrauded⁴; but until the title of the purchaser is thus completed that of the true owner prevails.⁵

Where an owner of shares hands the certificates and a blank transfer to another for the purpose of enabling that other to raise money upon them, he will be bound by the acts of his agent even though they exceed his actual authority, for the lender will not be deemed to have notice of the limitation of authority and may act on the assumption that it is unlimited⁶; but if the owner deposits his certificates with a blank transfer by way of security for a loan the lender is not an agent, and though he can transfer all the title he has (*i.e.* the benefit of the charge for the amount of his advance) he cannot give any greater title.⁷

A transfer in blank is not a complete security to the holder. If the transfer is by deed any subsequent alteration of or addition to the deed renders it void as a deed,⁸ unless the alteration or addition is made in pursuance of an authority under seal. It is no doubt still evidence of an agreement to transfer, and so gives the transferee

¹ *France v. Clark*, [1884] 26 Ch. D. 257; *Williams v. Colonial Bank*, [1888] 38 Ch. D. 388; *Fox v. Martin*, [1895] W. N. 36, 64 L. J. Ch. 473.

² *Sheffield v. London Joint Stock Bank*, [1888] 13 App. Ca. 333; *Nanney v. Morgan*, [1888] 37 Ch. D. 346.

³ *Indo China Steam Navigation Co.*, [1917] 2 Ch. 100.

⁴ *Société Generale v. Walker*, [1886] 11 App. Ca. 20; *Sheffield v. London Joint Stock Bank*, [1888] 13 App. Ca. at page 345; *Colonial Bank v. Hepworth*, [1887] 36 Ch. D. 36.

⁵ *Ireland v. Hart*, [1902] 1 Ch. 522.

⁶ *Fry v. Smellie*, [1912] 3 K. B. 282; *Brocklesby v. Temperance Building Society*, [1895] App. Ca. 173; *Rimmer v. Webster*, [1902] 2 Ch. 263.

⁷ *France v. Clark*, [1884] 26 Ch. D. 257; *Powell v. London and Provincial Bank*, [1893] 2 Ch. 555.

⁸ *Powell v. London and Provincial Bank*, [1893] 2 Ch. 555; *France v. Clark*, [1884] 26 Ch. D. 257.

an equitable title, but until the transferee has completed his legal title any person having an earlier or better equity can enforce it.¹ Notice to the company of an incomplete deed does not perfect the transferee's title so as to make it prevail over that of a person having a prior equity, for the company is precluded by Section 27 from taking notice of trusts.² Even when a deed is not required, it appears that if the original transferor died, the authority to fill in the blanks would be at an end,³ although no doubt an equity would subsist to compel the executors to give effect to the contract; and if the transferor, in fraud of the first transferee, executes another transfer to a third person, who gets this deed registered, the latter's title prevails; but the company, if it has notice of the earlier transfer, should not register the latter.⁴ In such a case it should give notice to the respective transferees, and require them to obtain a decision from the Court upon their rights.

In the case of colonial and foreign companies the form of transfer is often printed on the back of the certificate, and this being executed in blank is handed about as if the document were a share warrant to bearer. This has the desired effect, as is fully discussed in *Stern v. Regina*,⁵ setting out the effect of the *Colonial Bank v. Cady*.⁶ The registered holder who has executed the transfer in blank, and any subsequent holder whose title is derived from the blank transfer, by handing over the certificate and transfer confers on the recipient a title legal and equitable which will enable him to vest himself with the shares without risk of his right being defeated by any other person deriving title from the registered holder; accordingly if the owner leaves the certificate with such an executed transfer endorsed upon it with his broker who wrongfully pledges it with a bank the title of the bank which has no notice of the fraud will prevail.⁷

A forged transfer is no transfer, and gives the alleged transferee no rights, nor does such transferee acquire any rights by the

¹ *Treland v. Hart*, [1902] 1 Ch. 622, *Société Générale v. Walker*, [1886] 11 App. Ca. 20.

² *Société Générale v. Walker*, [1886] 11 App. Ca. 20.

³ *Ex parte Sargent*, [1874] 17 Eq. 273; *Powell v. London and Provincial Bank*, [1893] 1 Ch. 612 and 2 Ch. 555, *Kelly v. Munster and Leinster Bank*, [1891] 20 L. R. Ir. 19. But see *Carter v. White*, [1884] 25 Ch. D. 666.

⁴ *Post v. Clayton*, [1906] 1 Ch. 659.

⁵ [1896] 1 Q. B. 211.

⁶ [1890] 15 App. Ca. 267.

⁷ *Fuller v. Glyn, Mills, Currie & Co.*, [1914] 2 K. B. 168; *Colonial Bank v. Cady*, [1890] 15 App. Ca. 267. *Swinfen Eady, J. J.*, in *Bernard v. Foster*, [1916] 1 K. B., at page 636 speaks of shares in such a condition being "bearer shares, passing from hand to hand." This is not strictly accurate, but for the purposes of that case the shares were in the same position as bearer shares, and a person who held them with a lien and power of sale was held to be a "mortgagee in possession" of them.

simple fact of the company issuing to him a certificate stating that he is the holder of the shares which the transfer purports to assign.¹ But if any person has paid money or given valuable consideration, or has entered into a contract for the resale of the shares, relying, not upon the forged transfer, but upon the company's certificate, the company is liable to make good, by way of damages, any loss which such person may have suffered.² In cases where the supposed transfer is from a person who has no shares, the like result will follow if the transferee has been "put to rest" by the certificate, so as not to claim repayment of the purchase money from the vendor at a time when he might successfully have done so, the onus of proof that he cannot now recover being upon the transferee; but if the company desires to set up that he could not have got his money back at the time of the transfer, the onus of proving this is upon the company.³ But where the supposed transferee has himself put forward to the company the forged transfer he cannot set up as an estoppel the certificate issued in response to his request, and in every case the person claiming relief must show that he has suffered loss by having been misled by the certificate.⁴

If the company, acting upon a forged transfer, remove the true owner from the Register and substitute the supposed transferee, it can be compelled to replace the true owner and restore to him his shares, paying him also any dividends that may have been declared in the meanwhile⁵; but the company need not (unless it has adopted The Forged Transfers Acts, 1891 and 1892, or has become bound by some estoppel to recognise the transferee) pay any compensation to the supposed purchaser.

A contract is to be implied on the part of the person lodging a transfer that he will indemnify the company if the document prove to be a forgery, and the broker who deposits the forged transfer in good faith is equally liable to the company for any loss it may suffer thereby⁶; also, if the forgery is discovered before the transferee has acquired rights by estoppel, the company may recover the certificate and remove the transferee's name from the

¹ *Simm v. Anglo-American Telegraph Co.*, [1879] 5 Q. B. D. 188.

² *Bahia and San Francisco Railway Co.*, [1868] L. R. 3 Q. B. 581; *Hart v. Frontano Co.*, [1870] L. R. 5 Ex. 111, *Balkis Consolidated Co. v. Tomkinson*, [1893] App. Ca. 396; *Ottos Kopje Diamond Mines*, [1893] 1 Ch. 618. See also *Sheffield Corporation v. Barclay*, [1905] App. Ca. 392.

³ *Dixon v. Kennaway*, [1900] 1 Ch. 833.

⁴ *Simm v. Anglo-American Telegraph Co.*, [1879] 5 Q. B. D. 211; *Sheffield Corporation v. Barclay*, [1905] App. Ca. 392.

⁵ *Barton v. North Staffordshire Railway Co.*, [1888] 38 Ch. D. 458; *Barton v. London and North-Western Railway Co.*, [1890] 21 Q. B. D. 77.

⁶ *Sheffield Corporation v. Barclay*, [1905] App. Ca. 392.

Register.¹ So, if the broker represents that he has authority to act for the supposed transferor when in fact he has not, even if he is acting in good faith, he is liable upon an implied contract that he has authority,² and a person who identifies a transferor as being the person entitled to transfer is liable if it turns out that a fraud is being committed and a stranger is impersonating the owner of the shares.³

Transfers of stock or shares in any company may be stopped by any person interested in such stock or shares giving the company a notice under the provisions of the Rules of the Supreme Court, Order XLVI., Rules 3 to 11, which provide a procedure to take the place of the old writ of Distringas.

By the terms of those Rules, any person who has such an interest may, upon making and filing an affidavit of his interest, and serving an office copy of the affidavit and a notice on the company, require it to stop the transfer of or the payment of dividends upon the stock or shares in question. This notice prevents the company from transferring the stock or shares or paying the dividends without giving the person who served the notice an opportunity of applying to the Court to prevent the transfer or payment. But if the person in whose name the stock or shares stand requests the company to transfer or pay, the company must notify the person who gave the notice, and if he does not within eight days obtain an Order from the Court, the company may proceed, despite the notice, to deal with the stock or shares or pay the dividends as requested. This course is, in practice, very little resorted to; but it will be obvious that a very valuable method is provided for checking any anticipated or possible misappropriation of stock by a trustee or person whose title to the shares is not absolute. If such a notice is served on the company, it must be careful not to transfer or pay without referring to the issuer of the notice.

TRANSMISSION OF SHARES.

A transmission of shares occurs upon the holder dying, being found a lunatic, or becoming bankrupt. The persons with whom the company must deal in such a case are the executors or administrators of a deceased shareholder, the committee of a lunatic one, and the trustee of a bankrupt, all of whom may be described by the words "the representatives of the former holder." The title of the trustee in bankruptcy to the shares of the bankrupt

¹ *Per* Romer, L. J., in the *Sheffield Corporation Case*, [1903] 2 K. B. 504.

² *Starkey v. Bank of England*, [1903] App. Ca. 114.

³ *Bank of England v. Cutler*, [1907] 1 K. B. 889.

is conferred by The Bankruptcy Act, 1914, which, by Section 38 vests in him the property, by Section 48, Sub-section 3, empowers him to exercise the right of transfer to the same extent as the bankrupt could have done (*i.e.* so far as the bankrupt could have transferred without infringing the rights of equitable mortgagees or others), and by Section 54 to disclaim the shares; but such disclaimer is not, except so far as is necessary to release the bankrupt and his property from liability, to affect the rights and liabilities of any other person. Unless the Articles otherwise provide, the trustee can either take the shares into his own name, leave them in the name of the bankrupt, transfer them without first taking them into his own name, or disclaim them, but in each case the rights of third parties are left unaffected.¹ If the trustee takes partly paid shares into his own name he becomes liable for calls; but if he leaves them in the bankrupt's name only the estate of the bankrupt is liable. If the trustee disclaims the shares the company can prove for any loss it suffers by the disclaimer, and any person interested in the shares can apply to the Court for an Order vesting the property in the disclaimed shares in him (Bankruptcy Act, 1914, Section 54). When the trustee takes the shares into his own name he can insist upon a "clean" certificate, *i.e.* he can object to an entry in the Register or upon the certificate that he holds them as trustee or subject to a lien.²

The title of executors or administrators is shown by the probate or letters of administration, which must be produced to the company for registration, and thereupon the executors or administrators are the persons with whom the company must deal in all matters relating to the shares. The directors cannot reject an executor's claim to shares held by the testator, relying upon an Article which enables them to refuse transfers, such as, for instance, Clause 10 of Table A, 1862, or Clause 20 of Table A, 1908, because such Articles do not apply to a transmission by operation of law.³ Clause 22 of Table A, 1908, however, gives the directors in such a case "the same right to decline or suspend registration as they would have had in the case of a transfer of the share by the deceased or bankrupt person before the death or bankruptcy." But to exercise this right of "declining" there must be a resolution of the Board to that effect. Accordingly if no such resolution can be passed owing to the directors being equally divided, and the chairman having no casting vote, registration cannot be refused.⁴

¹ *Cannock v. Rugeley Colliery Co.*, [1885] 28 Ch. D. 303, *Wise v. Launsdell*, [1921] 1 Ch. 420.

² *W. Key & Son*, [1902] 1 Ch. 467.

³ *Bentham Mills Spinning Co.*, [1879] 11 Ch. D. 900.

⁴ *Hackney Pavilion, in re*, [1924] 1 Ch. 276.

Directors cannot insist upon entering the name of an executor in the Register of Members as holding the shares in a representative capacity, and must enter the names of executors in such order as they desire¹ or even divide the shares into blocks with the names of the holders entered in a different order;² a matter which is of importance when the Articles give the right of voting to the member first named in the Register.

When shares have passed to a trustee in bankruptcy, executor, or administrator, the estate of the former holder remains entitled to any benefits and liable to pay any calls that are made until some person is put upon the Register as the actual holder of the shares³: for instance, if the Articles require that new shares shall be offered to the members, the estate of a deceased member must not be ignored,⁴ and the executors, although not on the Register of Members, can give notice of dissent in case of a reconstruction under Section 192,⁵ but the representative holders are not personally liable for calls, even if the company without their consent places their names upon the Register.⁶ The Articles sometimes compel representative holders either to take the shares in their own names, assuming all the responsibilities of a member of the company, or to nominate some other person to take the shares. If such provisions are not in the Articles, there is nothing to prevent representative holders from continuing to allow the shares to remain in their names as representatives only. But in the absence of express provisions in the Articles (such as those found in Clause 114 of Table A of 1908) the representatives are not entitled to have any notices sent to them or to the deceased unless they have become members by formal registration.⁶

Whether the executors or other representatives have taken the shares into their own names or not, they can transfer them (Section 29). If in their own names, they will transfer as the registered holders; otherwise, they will transfer as executors or administrators, or as the case may be.

The usual course upon the death of a member is for the executors either to make an agreement with the company by which they accept the liabilities attached to the shares (this agreement should have a sixpenny stamp), or to execute a

¹ *T. H. Saunders & Co.*, [1908] 1 Ch. 415.

² *Borus v. Siemens Brothers Dynamo Works*, [1919] 1 Ch. 225.

³ *James v. Buena Ventura Syndicato*, [1896] 1 Ch. 456; *New Zealand Gold Extraction Co. v. Peacock*, [1894] 1 Q. B. 622; *Baird's Case*, [1870] 5 Ch. 725.

⁴ *Llewellyn v. Kasintoo Rubber Estates*, [1914] 2 Ch. 670.

⁵ *Buchan's Case*, [1879] 4 App. Ca. 549, 583.

⁶ *Allen v. Gold Reefs of West Africa*, [1900] 1 Ch. 656.



transfer passing the shares to the legatee or to a purchaser. If the shares are transferred to a specific or residuary legatee the consideration will be nominal, and the stamp duty ten shillings¹; if transferred in satisfaction of a money legacy (*i.e.* if the legatee entitled to money accepts shares in place of it) *ad valorem* stamp duty will be payable, computed upon the amount set out in the instrument of transfer.

In England and Ireland the names of representatives cannot be inserted with a statement that they are trustees.² In cases of trust, therefore, either the trustees must be registered (when they become personally liable for calls and the company is entitled to assert its lien or other rights against the trustees without regard to the interests of the *cestui que trust*³), or the beneficial owners, being registered, have complete control over the shares. Companies, societies, and corporations may be registered in their own right without the intervention of trustees.

Before any dividends are paid to or any transfers accepted from representative shareholders, their own title to the shares must be made out. A trustee in bankruptcy or a committee of a lunatic must prove his appointment as such, producing the Order of the Court. In the case of executors or administrators the probate of the will or the letters of administration should be produced to the company, and the secretary should endorse the fact of their production upon those documents.⁴ He should also make an entry in the Register of the death, bankruptcy, or lunacy of the shareholder, and of the names and addresses of the executors or administrators, trustee or committee, or of the person to whom they transfer, whether legatee, next-of-kin, or purchaser.

On the death of a holder of partly paid shares it seems the company cannot intervene to prevent the distribution of the estate, unless a call has actually been made.⁵ On the bankruptcy of a member the company may prove for the estimated value of the liability for future calls.⁶

Where several persons are registered as the joint holders of shares, and one dies, the survivors are entitled to the shares, but

¹ This is confirmed by The Finance (1900-10) Act, 1910, Section 71, Sub-section 6.

² "No notice of any trust, expressed, implied, or constructive, shall be entered on the Register, or be receivable by the Registrar, in the case of companies registered in England or Ireland" (Section 27).

³ *London and Brazilian Bank v. Brocklebank*, [1882] 21 Ch. D. 302. But the new Table A does not give a lien on shares held jointly by two or more persons.

⁴ In *New York Breweries v. Attorney-General*, [1899] App. Ch. 62, the House of Lords held that a company recognising the title of foreign executors who had not taken out probate in England was liable to pay the probate duty and penalties.

⁵ *Re King, Mellor v. South Australian Land Co.*, [1907] 1 Ch. 72.

⁶ *Re McMahon*, [1900] 1 Ch. 173.

before dealing with them they should be required to produce evidence of the death of the former co-owner. This is usually done by the production of a copy of the certificate of death, procured from Somerset House. If there is any discrepancy in the description, a statutory declaration of the identity of the shareholder with the person named in the certificate of death should also be produced.

CERTIFICATION OF TRANSFERS.

In connection with transfers of shares a system is in operation of which judicial notice has been taken, and which seems to require some words of explanation. It is the custom on the Stock Exchange when shares are transferred for the transferor to hand over to his broker, with the instrument of transfer, the certificate of the shares transferred. Before passing the instrument of transfer to the purchaser's broker, the transferor's broker lodges the certificate at the company's office, and the secretary certifies the fact on the margin of the instrument of transfer, and such "certification" is accepted by the purchaser's broker as evidence that the transferor has a title to the shares mentioned in that instrument. The following is the form of certification commonly adopted—

<i>Certificate for</i>	<i>shares,</i>	<i>paid, has been lodged at</i>
<i>the company's office</i>		
<i>Date</i>	<i>The</i>	<i>Company, Limited,</i>
		<i>Secretary.</i>

If the share certificate includes more shares than are to be transferred, a "balance ticket" is usually handed to the broker for the remaining shares, to be exchanged later for a share certificate.

The certified transfer is then handed to the purchaser's broker to be executed by the purchaser, stamped with the proper duty, and lodged at the company's office with the prescribed transfer fee. In due course the transfer is passed by the board, entered up in the Register, and a new share certificate issued for the shares sold, and another certificate for those retained, which is supplied to the original member, his broker or agent, in exchange for the "balance ticket."

In cases where a broker or agent is not employed, the transferor and transferee should go through the same or a similar procedure.

In the case of *Bishop v. Balkis Consolidated Co.* (1890, 25 Q. B. D. 520), Lindley, L. J., said: "It is to the interest of every company to do what it can to assist its shareholders to deal with their shares in the way in which shares in other companies are ordinarily dealt with. . . . In my opinion, it is proved that to give 'certifications' is incidental to the transaction, in the ordinary business way, of part of the legitimate business of all companies having capital divided into shares which are transferable

by deed or other instrument." It was further held in that case that if the certification were made by a proper officer of the company, the company would be bound to give effect to it as if it were true, but that the certification was only a statement that a certificate was lodged, and did not amount to any representation that the proposed transferor had a good title, and the company was not bound to make good a loss arising from the invalidity of intermediate transfers. But if the certification, directly or by reference, states that a certificate of fully paid shares has been lodged, and on the faith of such certification the purchaser completes the purchase, it has been held that the company cannot subsequently make him liable for calls on the ground that the shares were not fully paid.¹

The authority of the cases referred to has been much shaken by the judgment of the House of Lords in the case of *George Whitechurch, Limited, v. Cavanagh*,² where it was held that the company was not estopped by the certification of its secretary (no certificate having in fact been lodged), on the ground that "it cannot be supposed that a company authorises the secretary to do more than give a receipt for certificates that are actually lodged." In the case cited the House of Lords found as a fact that the secretary was not acting for the benefit of the company, but for a private object: but having regard to the case of *Lloyd v. Grace Smith & Co.*³ it is difficult to see why the public are not entitled to treat the secretary as having the necessary authority to do what Lindley, L. J., has described as incidental to the transaction of the company's business (see page 218, *supra*).

Where a certificate of shares was in the possession of the company and the secretary duly certified a transfer, but afterwards by inadvertence handed the certificate to the transferor, who fraudulently pledged it with third parties, it was held that the company was not liable to those third parties either for negligence or by estoppel, for it owed no duty to them, and the issue of the certificate was not the proximate cause of their loss.⁴

¹ *Re Concessions Trust*, [1890] 2 Ch. 757.

² [1902] App. Ca. 117.

³ [1912] App. Ca. 716, discussed at page 339, *infra*.

⁴ *Longman v. Bath Electric Tramways*, [1905] 1 Ch. 646.

CHAPTER X.

BORROWING.

GENERAL BORROWING POWERS.

BESIDES raising capital by means of shares, companies very frequently, either at the time of their incorporation or subsequently, raise money by borrowing. This may be done in various ways—by an ordinary unsecured loan, by making and discounting bills or promissory notes, by a mortgage on the property of the company, or by the issue of debentures. In all these cases it is necessary to see, first, whether the company has power to borrow; secondly, whether the directors have authority to exercise the company's borrowing powers without a resolution of the company; thirdly, whether there is any limit on the amount which may be borrowed, and, if so, whether that limit is reached; and, fourthly, whether the company or the directors have power to secure the repayment of the money borrowed by a mortgage or charge on all or any part of the assets of the company. For the answers to all these questions the Memorandum and Articles of Association must be carefully consulted.

If the Memorandum is silent, a power to borrow will not be implied "unless it be properly incident to the course and conduct of the business for its proper purpose." Thus a building society,¹ or a school board,² or a literary and scientific institution,³ in the absence of an express power, cannot borrow at all; but a shipping company,⁴ an omnibus company,⁵ a colliery company,⁶ and generally any trading⁷ or commercial⁸ company has an implied power to borrow, even if the Memorandum and Articles are entirely silent on these points, and still more would a banking company have such a power.⁸ Where a company has not power to borrow or its borrowing powers are exhausted it may procure goods or get work done on credit, and may give bonds (often called "Lloyds Bonds") in payment. These are

¹ *Blackburn Benefit Building Society v. Cunliffe Brooks*, [1882] 22 Ch. D. 61.

² *Regina v. Sir Chas. Reed*, [1880] 5 Q. B. D. 483.

³ *Re Badger*, [1905] 1 Ch. 568. The Literary and Scientific Institutions Act, 1864, gives a limited power under which money required for proper repairs may be borrowed.

⁴ *Australian Auxiliary Steam Shipper Co. v. Mounsey*, [1858] 27 L. J. Ch. 729, 4 K. & J. 733.

⁵ *Bryan v. Metropolitan Saloon Omnibus Co.*, [1858] 3 De G. & J. 123.

⁶ *Jackson v. Rainford Coal Co.*, [1896] 2 Ch. 340.

⁷ *General Auction Estate Co. v. Smith*, [1891] 3 Ch. 432; *Young v. David Payne & Co.*, [1904] 2 Ch. at page 612.

⁸ *Bank of Australasia v. Breillat*, [1847] 6 Moo. P. C. 195.

valid¹ and may be negotiated, but if given in respect of a loan when there is no borrowing power they are void, for the consideration is bad.² Moreover, a company which has not power to borrow may give a creditor rights similar to those which he could acquire by taking the company's property in execution, and accordingly without waiting for process may create a mortgage or charge in favour of the creditor.³

When there is a power to dispose of the property of the company, it can be used to secure the debts of the company properly incurred (*i.e.* by borrowing, if authorised) by giving a mortgage over the property, unless the Memorandum expressly prohibits it.⁴

The Memorandum or Articles of Association frequently give a limited power to borrow and mortgage (*e.g.* up to a named sum or to the amount of the issued capital or the uncalled capital⁵): in such a case there is an implied veto on borrowing or mortgaging beyond the limits set,⁶ and if the directors borrow beyond the limits no debt, legal or equitable, is created, and the securities issued are void.⁷ And this was held to be so even in a case where the borrowing being originally *ultra vires* the company obtained power to borrow and then issued securities for the loans previously obtained.⁸ However, even where the loan is unauthorised, lenders whose money has been used to pay off authorised loans may stand in the place of and enforce the remedies of those whose loans were so paid.⁹ The whole position was discussed in the case of the Birkbeck Building Society,¹⁰ the effect of the decision in that case being given on page 388, *infra*. The directors of a company also may be personally liable in damages if they represented that they had authority to issue the debentures when they had not,¹¹ or that

¹ White v. Carmarthen Railway Co., [1863] 1 H. & M. 786, Cork and Youghal Railway Co., [1869] 4 Ch. 748.

² Chambers v. Manchester and Milford Railway, [1861] 5 B. & S. 588, where Blackburn, J., points out that they do not create a debt, but only evidence the existence of one.

³ Blackmore v. Yates, [1867] L. R. 2 Ex. 225, Staggs v. Medway (Upper) Navigation Co., [1903] 1 Ch. 169.

⁴ Re Patent File Co., [1871] L. R. 6 Ch. 83.

⁵ Where the limit is "the uncalled capital" this includes unissued capital (English Channel Steamship Co. v. Rolt, [1881] 17 Ch. D. 715).

⁶ Wenlock v. River Dee Co., [1885] 10 App. Cas. 354; Birkbeck Benefit Building Society, [1912] 2 Ch. 183.

⁷ Howard v. Patent Ivory Co., [1888] 38 Ch. D. 156.

⁸ *Ex parte* Watson, [1882] 21 Q. B. D. 301, Rottomgate Industrial Society, [1891] 65 L. T. 712.

⁹ Blackburn and District Benefit Building Society, [1885] 20 Ch. D. 902, Baroness Wenlock v. River Dee Co., [1887] 10 Q. B. D. 155; Neath Building Society v. Luce, [1890] 43 Ch. D. 158; Wrexham, Mold, and Connah's Quay Railway, [1899] 1 Ch. 440, Birkbeck Benefit Building Society, [1912] 2 Ch. 183; Reversion Fund and Insurance Co. v. Munson Cosway, [1913] 1 K. B. 364, Sumner v. Harris Calculating Machine Co., [1914] 1 Ch. 420.

¹⁰ [1911] App. Cas. 398.

¹¹ Furbank's Executors v. Humphreys, [1887] 18 Q. B. D. 51; Looker v. Wrigley, [1880] 9 Q. B. D. 397.

the amounts borrowed were within the limit of the company's powers,¹ and the mere offer of the debentures, or the acceptance of bills of exchange on behalf of the company,² may amount to such a representation; but a representation as to a point of law in regard to borrowing will not render directors liable if both parties had equal means of knowledge.³

The measure of damages as against the directors is that the lender should be put in as good a position as if the representation were true; therefore if he obtains judgment against the company, but the assets are deficient, he will recover nothing from the directors,⁴ and if he obtains another security the difference between the value of the two securities will be the measure, and not the difference between the amount lent and the amount recovered on the substituted security.¹

But this distinction must be noted. If the borrowing is beyond the powers of the company (*e.g.* not justified by its Memorandum), the loan and all securities for it are entirely void⁵; but if the borrowing is only beyond the powers of the directors, and the company could by altering its Articles of Association or otherwise have authorised the loan, then it is capable of being ratified by the company, and by acquiescence or otherwise may become valid.⁶ Further, if under the Articles limiting the directors' powers, the transaction may have been lawfully carried out (*e.g.* by obtaining the sanction of the company in general meeting), the lender is entitled to assume that all necessary steps have been taken to validate the borrowing, and is not bound to require evidence of this,⁷ though if a special [or extraordinary] resolution would be necessary he cannot assume that such a resolution has been passed, for it would appear among the documents registered at Somerset House⁸; and a director who lends money to the company must be taken to know whether the proper steps have been taken.⁹

A lender is not bound to inquire for what purpose money is being borrowed,⁹ but if he knows that the loan is for an illegitimate

¹ *Whitehaven Joint Stock Bank v. Reed*, [1886] 54 L. T. 360.

² *West London Commercial Bank v. Kitson*, [1881] 13 Q. B. D. 360, and cases cited on page 225, notes 1 and 2.

³ *Rashdall v. Ford*, [1806] 2 Eq. 750.

⁴ *Bentley v. Lord Ebury*, [1874] L. R. 7 H. L. 102.

⁵ *Chapleo v. Brunswick Building Society*, [1881] 6 Q. B. D. 686, *Wenlock v. River Dee Co.*, [1885] 10 App. Ch. 351.

⁶ *Irvine v. Union Bank of Australia*, [1877] 2 App. Ch. 366.

⁷ *Fountaine v. Carmarthen Railway Co.*, [1868] 5 Eq. 316.

⁸ *Howard v. Patent Ivory Co.*, [1888] 38 Ch. D. at page 170.

⁹ *Marseilles Extension Railway Co.*, [1872] 7 Ch. 161, *Young v. David Payne & Co.*, [1904] Ch. 608. If *Davis's Case* (1871, 12 Eq. 561) held the contrary, it is overruled by these cases.

purpose he cannot recover the money lent,¹ and if a company is the lender the private knowledge of one of its directors will not be imputed to the lending company.²

If a company has power (express or implied) to borrow, it can create mortgages or charges to secure the repayment of the loan³; but if the power is express, any limitations contained in the power must be observed. Thus, if the Memorandum contains the necessary authority, the company can charge or mortgage all its property, of whatever nature, including future property, such as book debts not yet due,⁴ and also its uncalled capital,⁵ although this is, "strictly speaking, more in the nature of power than of property"⁶; but not capital which can only be called up in the event of a winding up as provided by Section 59,⁷ nor the amount payable under the guarantee in the case of a company limited by guarantee, this not being part of the capital of the company nor at any time under the control of the directors.⁸

A power to mortgage "assets,"⁹ or "property and rights,"¹⁰ or a power to borrow on mortgage of "property and effects, or in such other manner as the company may determine,"¹¹ includes uncalled capital,¹² except as above mentioned. But a power to charge "property," or "property and funds,"¹³ or "real and personal estate,"¹⁴ or "property and effects,"¹⁵ or "undertaking and property present and future,"¹⁶ does not authorise a charge on uncalled capital, unless the Articles of Association treat the uncalled

¹ Davis's Case, [1871] 12 Eq. 561.

² Young v. David Payne & Co., [1901] 2 Ch. 608.

³ R. Patent File Co., [1871] L.R. 6 Ch. 83, Australian Auxiliary Steam Shipper Co. v. Mounsey, [1858] 27 L. J. Ch. 729, Bryan v. Metropolitan Saloon Omnibus Co., [1858] 3 De G. & J. 123.

⁴ Illingworth v. Houldsworth, [1904] App. Ca. 353; Bloomer v. Union Coal Co., [1873] 10 Eq. 383, compare Thilly v. Official Receiver, [1889] 13 App. Ca. 523.

⁵ Newton v. Anglo-Australian Investment Co., [1895] App. Ca. 244, *re* Pyle Works, Limited, [1890] 44 Ch. D. 534. It is suggested, however, by Cotton, L. J., that a mortgage to a shareholder of the calls on his own shares would not be valid as being really a set-off (see 44 Ch. D. 581).

⁶ Bank of South Australia v. Abrahams, [1875] L. R. 6 P. C. 271.

⁷ Bartlett v. Mayfair Property Co., [1898] 2 Ch. 28.

⁸ *Re* Pyle Works, Limited, [1890] 44 Ch. D. at pages 574, 584, but capital which can only be called up with the sanction of a special resolution may be charged, and the charge enforced in a winding up even though no such resolution has been passed (Newton v. Anglo-Australian Investment Co., [1895] App. Ca. 244).

⁹ Page v. International Agency, [1893] W. N. 32, 68 L. T. 435.

¹⁰ Howard v. Patent Ivory Co., [1888] 38 Ch. D. 156, *re* Pyle Works, [1890] 44 Ch. D. 534.

¹¹ Jackson v. Rainford Coal Co., [1896] 2 Ch. 340.

¹² Phoenix Rossemer Steel Co., [1875] 44 L. J. Ch. 683.

¹³ Bank of South Australia v. Abrahams, [1875] L. R. 6 P. C. 265, Stanley's Case, [1866] 4 De G. J. & S. 407.

¹⁴ Colonial Trusts Corporation, [1880] 15 Ch. D. 465.

¹⁵ Sankey Brook Coal Co. No. 2, [1871] 10 Eq. 381.

¹⁶ *Re* Streatham Estates Co., [1897] 1 Ch. 15, Johnson v. Russian Spratt's Patent, [1898] 2 Ch. 149.

capital as part of the property chargeable.¹ A power to borrow money on a mortgage of its undertaking authorises a company to charge a part of its property: *e.g.* its barges,² and "property" includes future property and goodwill.³ A charge on "plant, machinery, and effects" does not include book debts,⁴ but a charge on "all the assets" includes moneys recoverable from directors for misfeasances,⁵ and takes precedence of the costs of liquidation, but not of the liquidator's costs in recovering the particular asset charged.⁶

The security need not be given at the time the loan is made, for a company may give existing creditors security for their debts, such as a bill of sale,⁷ a mortgage,⁸ or debentures.⁹

Where three companies, each having power to borrow on debentures, purported to issue debentures jointly, charged on all their respective properties, it was held that each company was liable only to the amount it had actually received, and the debentures were void as to the balance.¹⁰

If the Memorandum or Articles of Association give a borrowing power, and do not restrain the exercise of it by the directors, the directors, acting on their general power to conduct the business, can borrow and mortgage without any further authority from the company.

A company can borrow money and incur debts in any manner in which an individual can do so. Large companies, particularly banks, borrow largely on deposit. But depositors should remember that they have no *security* for their money, for the acceptance of a deposit gives no charge or lien upon the property of the company.

¹ *Hume v. Diachenfels Banket Gold Mining Syndicate*, [1895] 2 Mins. 146.

² *Reeve v. Medway (Upper) Navigation Co.*, [1905] 21 T. L. R. 400.

³ *Salter v. Lens Hotel Co.*, [1902] 1 Ch. 332.

⁴ *Anglo-American Cloth Co.*, [1880] 43 L. T. 43.

⁵ *Park Gate Waggon Co.*, [1881] 17 Ch. D. 230.

⁶ *Anglo-Austrian Printing Co.*, [1895] 2 Ch. 891; *Barned's Banking Co.*, [1871] 6 Ch. 388.

⁷ *Shears v. Jacob*, [1896] L. R. 1 C. P. 513; *Deffell v. White*, [1867] L. R. 2 C. P. 144.

A company is not within the Bills of Sale Acts so far as they relate to mortgages or charges, for the registration of which the Companies Act makes provision (see page 227, *infra*). Whether they are within the Act of 1878 in regard to absolute bills of sale has not been clearly decided (see *Reid v. Jommon*, [1890] 25 Q. B. D. 300; *Standard Manufacturing Co.*, [1891] 1 Ch. 627, where the dicta seem to exclude companies from both Acts). But the better opinion appears to be that where a document is within the statutory definition of a bill of sale, but does not create a mortgage or charge, *e.g.* where it merely confers a licence to seize, or is an absolute bill of sale, registration in accordance with the Bills of Sale Acts will be necessary (see *per Banks, L. J.*, *National Provincial and Union Bank of England v. Charnley*, [1924] 1 K. B. at page 140. See, further, an admirable discussion of the subject in *Weir on Bills of Sale*, pages 318 *et seq.*).

⁸ *Re Patent File Co.*, [1871] L. R. 6 Ch. 83. *Australian Auxiliary Steam Clipper Co. v. Mounsey*, [1868] 4 K. & J. 733, 27 L. J. Ch. 729.

⁹ *Landowners &c. Co. v. Ashford*, [1880] 14 Ch. D. 11; *Howard v. Patent Ivory Co.*, [1888] 38 Ch. D. 156; *Schizman v. Prince*, [1895] 2 Ch. 617.

¹⁰ *Johnston Foreign Patents Co.*, [1904] 2 Ch. 234.

A company may make bills of exchange and promissory notes for the purpose of obtaining credit if it has power in its Memorandum so to do, or if its business is such as to make the use of bills necessary, but not otherwise,¹ and when it has this power the bills or notes may be signed by any person authorised by the company. The company, moreover, is liable to a *bona fide* holder if the bill is signed by someone having apparent though not actual authority.² If when the company has not this power the directors purport to make bills on its behalf, they will be personally liable to a *bona fide* holder for having represented that they had an authority they did not possess,³ unless the want of authority appears from the Memorandum or Articles. Holders of bills and notes of a company are unsecured creditors, and in a winding up would receive a dividend with the ordinary creditors.

An overdraft from bankers is a borrowing, and is legitimate if the company has borrowing powers; but if these are limited, the amount of the overdraft must be counted in estimating the amount the company has borrowed.⁴ If the directors represent that a manager has power to draw cheques when he has not they will be personally liable for the amount of his drawings,⁵ but an authority to a man to draw on the company's account is not an authority to overdraw or a representation that he has such authority.⁶ A banker has a lien upon his customers' securities deposited with him for overdrafts,⁷ unless the securities are deposited for some specific purpose,⁸ and can avail himself of this lien against a company as well as against any other client. Stock brokers also have a general lien on securities held by them for clients.⁹ But in the case of either bankers or brokers the express terms of the deposit may negative or limit the implied right to a lien.¹⁰ A pledge of securities gives a power of sale on default of payment at the due date, or, if no date for payment is fixed, after notice.¹¹

¹ *Bateman v. Mid-Wales Railway Co.*, [1866] L. R. 1 C. P. 409, *re Peruvian Railways Co.*, [1867] L. R. 2 Ch. at page 622.

² *Doy v. Pullinger Engineering Company*, [1921] 1 K. B. 77.

³ *West London Commercial Bank v. Kitson*, [1881] 13 Q. B. D. 360.

⁴ *Looker v. Wrigley*, [1880] 9 Q. B. D. 397; *Brooks v. Blackburn Benefit Building Society*, [1885] 9 App. Ch. 865, 868.

⁵ *Cherry v. Colonial Bank*, [1869] L. R. 3 P. C. 24.

⁶ *Bentley v. Lord Ebury*, [1874] L. R. H. L. 102.

⁷ *Bock v. Gorissen*, [1860] 2 De G. F. & J. 434, *London Chartered Bank v. White*, [1870] 4 App. Ch. 422, *Jones v. Peppercorne*, [1859] 10 Ch. 430.

⁸ *Brandao v. Barnett*, [1846] 12 Cl. & F. 787; *Leese v. Martin*, [1873] 17 Eq. 224.

⁹ *London and Globe Finance Corporation*, [1902] 2 Ch. 416; *Jones v. Peppercorne*, [1859] 10 Ch. 430.

¹⁰ *Wilde v. Radford*, [1864] 33 L. J. Ch. 51; *re Bowes*, [1880] 33 Ch. D. 586.

¹¹ *Deverges v. Sandeman*, [1902] 1 Ch. at page 503; *Donald v. Suckling*, [1870] L. R. 1 Q. B. 604.

A company having power to borrow and mortgage may make an ordinary mortgage of its real or personal property without issuing debentures. A pretended sale which is really a disguised borrowing will be treated as a borrowing, and will not give the pretended purchaser any better security than a mortgage.¹ But a sale of rolling stock by a railway company on the terms that they should hire it again at a rent which would return the purchase price in five years and then have the right to purchase at a nominal sum was held to be a sale and not a loan.²

It is very common for banks to require in addition to the debentures the personal guarantee of the directors; in such case all the usual rights and liabilities of sureties exist, including the right of contribution among themselves: thus where directors or others who have guaranteed a loan secured by mortgage or charge are called upon to perform their guarantee, they obtain by subrogation the rights of the lender and are entitled to the benefit of the security.³

Public companies registered since the 31st December, 1900, may not exercise any borrowing powers until the time when they are authorised to commence business, as to which see page 167, *supra* (Section 87).

BORROWING ON DEBENTURES.

The most usual form of borrowing by a company is on debentures. These are bonds given under the seal of the company, and evidence the fact that the company is liable to pay the amount specified, with interest, and generally charge the payment of it upon the property of the company. They are usually issued for sums varying from £10 to £100, and are offered to the public by means of a prospectus in the same manner as shares. The applications for and allotments of debentures are similar to those in the case of shares: but, as a debenture holder is a creditor, and not a member of the company, widely different results follow.

Although moneys raised by debentures or on loan are capital moneys, they do not form part of the share capital of the company, but are a loan to and a debt due from the company, and interest is payable whether there are or are not profits. Debentures are the bonds or deeds which evidence the loan, and, if they purport to give a charge, create the security for its repayment. The question whether a company has power to issue debentures for a loan

¹ Old Bush Mills Distillery, *ex parte* Bank of Ireland, [1806] 1r R. 301, Coveney v. Perse, [1910] 1 Ir. R. 194.

² Yorkshire Railway Wagon Co. v. Maclure, [1882] 21 Ch. D. 309.

³ *Ex parte* Gibbs, [1875] 10 Eq. 312.

accordingly depends upon whether it has power to borrow money¹; and the question whether it has power to create a charge by the debentures or by a trust deed, and what assets it may charge, depends upon the powers of the company to secure the repayment of borrowed money by mortgaging all or some part of its assets. This matter has been already considered.

Although debentures are well-known instruments in the mercantile world, and are the subject of various provisions of the Acts of 1900, 1907, and 1908, there is, strangely enough, no complete legal definition of them, nor are they defined in either of the Companies Acts. It has been said by Chitty, J., that "a debenture means a document which either creates a debt or acknowledges it, and any document which fulfils either of these conditions is a debenture."² But this is probably too wide a definition.³ A document, with coupons attached, promising to "pay the amount of this debenture to A. B. or order," has been held to be liable to duty as a debenture, and not as a promissory note.⁴

Debentures may be either (A) a mere promise to pay, or (B) a promise to pay secured by a mortgage or charge. The mortgage or charge may be created by words in the debenture itself, or by a deed to the benefit of which the debenture holders are declared to be entitled, or by a combination of these two methods. Debentures, moreover, may be payable to the registered holder and those persons to whom he assigns, or to the bearer, in which latter case they pass by delivery.

A would-be subscriber for or purchaser of a debenture should therefore inquire carefully what sort of debenture he gets for his money. If it is not a mortgage debenture, the holder will only be able to prove in a winding up with other creditors, and the holder of such a debenture cannot prevent the company from making mortgages or charges which will rank in priority to his claim. If it is a mortgage debenture, it should be ascertained whether the charge is fixed or only a floating one, and whether the company has any property worth seizing: *e.g.* a tramway line where the venture is worked at a loss is not worth the price of old iron. A purchaser should also see that a copy of the Registrar's certificate of registration is endorsed on the debenture (see page 278, *infra*).

A debenture of a company formed under the Companies Acts is not within The Bills of Sale Acts, 1878 and 1882, and may

¹ But, as stated on pages 220 and 221, *supra*, even when there is no borrowing power bonds or debentures may be issued to secure an existing debt lawfully created.

² *Lovy v. Abercrombie Slate Co.*, [1888] 37 Ch. D. 204. See also *Edmunds v. Blaine Furnaces Co.*, [1887] 36 Ch. D. 215.

³ See (*per* North, J.) *Topham v. Greenside Co.*, [1888] 37 Ch. D. 281, 291. The question is discussed in Sir F. B. Palmer's "Company Precedents," Part III., page 1.

⁴ *British India Co. v. Commissioners of Inland Revenue*, [1861] 7 Q. B. D. 165.

therefore create a charge on chattels, without being in the form prescribed by or registered under the last-named Act.¹ It has been held that this exception does not apply to debentures of Building Societies and Industrial and Provident Societies,² but extends to the debentures of Foreign Companies,³ but it is difficult to reconcile these two rulings. If debenture holders are not paid in full out of their security they may prove in the winding up.⁴ If they prove before the security is fully realised they must value their security (see page 560, *infra*).

The charge created in equity by an agreement to issue debentures, if duly registered, will give an equal protection to the debenture holder as a complete debenture,⁵ and so will a debenture informally issued if the holder had no notice of the informality.⁶

In the absence of special provision in the Articles a mortgage debenture does not require a seal.⁷ Any document which is sufficient to create a charge will suffice.

Fixed and Floating Charges.

The charge created by a debenture may be either "fixed" or "floating." When the charge is fixed it is like an ordinary mortgage and affects the title to the property, so that the company can only deal with the property affected subject to the charge. But where the charge is a "floating" one the company may in the ordinary course of its business⁸ deal with the property covered by the charge, mortgaging it so that the mortgage takes priority of the floating charge, or selling or disposing of it, free from the floating charge, or using it up as the business requires at any time before the charge attaches,⁹ and if property is acquired subject to an existing charge or upon the terms of the purchase price being advanced on the security of the property, these charges will take priority of the floating charge,¹⁰ and the charge in the debentures will also

¹ Standard Manufacturing Co., [1891] 1 Ch. 627, *Richards v. Overseers of Kidderminster*, [1890] 2 Ch. 212. Registration is, however, necessary under the Companies Act of 1908.

² Great Northern Railway Co. v. Coal Co-operative Society, [1896] 1 Ch. 187.

³ *Clark v. Balm Hill & Co.*, [1908] 1 K. B. 667.

⁴ *Florence Land Co.*, [1879] 10 Ch. D. 530, *Colonial Trusts Corporation*, [1880] 15 Ch. D. 405.

⁵ *Simultaneous Printing Syndicate v. Fowleraker*, [1901] 1 K. B. 771.

⁶ *Duck v. Tower Galvanising Co.*, [1901] 2 K. B. 314.

⁷ *Umney v. Fireproof Doors, Limited*, [1916] 2 Ch. 142.

⁸ *Old Bush Mills Distillery Co.*, [1897] Ir. R. 488. What is the "ordinary course of business" will depend on the circumstances of each case. A specific mortgage to raise money for the purpose of carrying on the business of the company is within the words (*Cox Moore v. Peruvian Corporation*, [1908] 1 Ch. 604).

⁹ *Florence Land Co.*, [1879] 10 Ch. D. 530, *Wheatley v. Silkstone &c. Coal Co.*, [1885] 29 Ch. D. 715; *Hamilton's Windsor Ironworks*, [1879] 12 Ch. D. 707, *Colonial Trusts Corporation*, [1879] 15 Ch. D. at page 472, *Metropolitan Bank v. Vivian & Co.*, [1900] 2 Ch. 654.

¹⁰ *Conolly Brothers Wood v. Conolly*, [1912] 2 Ch. 25. In this case the property was conveyed to the company, but the title deeds were simultaneously deposited with the lender.

be subject to any other rights properly created, as, for instance, where fixtures taken under a hire purchase agreement are subject to a right of the owner to remove them.¹ But if the fixed mortgage is expressed to be subject to an earlier floating charge it will rank behind the floating charge,² and the power to create mortgages in priority to the floating charge does not give a right to create a second floating charge *pari passu* with an earlier one.³

A "floating" charge covers all the right of the company in the property which is specified as being subject to the charge, and may include movable chattels, book debts, uncalled capital, and future property (see page 223, *supra*). It is a present charge, not a future one, but it does not specifically affect any item until some event happens which causes it to become fixed,⁴ that is to say, the debenture holder has under his floating charge an immediate equity or charge on the property, but the company has the benefit of a licence or right to deal with the property charged in the course of its business until the charge attaches as a fixed charge, or, as it is often called, "crystallises." Thus, where the holders of a first mortgage sold certain fixed machinery but allowed the purchaser to leave it on the company's property, his title was held to prevail over that of the holders of a floating charge who appointed a receiver after the date of the sale⁵; and where properties let on leases were included, partly by a specific mortgage to trustees and partly by a floating charge, and the company assigned arrears of rent to a third party, the assignment was held to take precedence of the floating charge, but not of the specific mortgage.⁶ A company having several branches may, notwithstanding debentures may have been issued, sell the whole of the business of one branch,⁷ or even the whole of its undertaking, provided such sale is within the powers contained in the Memorandum of Association.⁸

The charge crystallises or becomes fixed upon the happening of the events mentioned in the debenture as those upon which

¹ *Morrison, Jones and Taylor, Limited*, [1914] 1 Ch. 50. This case was decided on the ground that the debentures were subsequent in date to the hiring agreement, and only created an equitable charge.

² *Re Robert Stephenson & Co., Limited*, [1913] 2 Ch. 201.

³ *Marshall v. Benjamin Cope & Sons*, [1914] 1 Ch. 800.

⁴ See (*per* Buckley, L. J.) *Evans v. Rival Granite Quarries*, [1910] 2 K. B. at page 980.

⁵ *Hamer v. London City & Midland Bank*, [1918] 118 L. T. 571; 87 L. J. (K. B.) 973.

⁶ *Ind, Coope & Co., Limited*, [1911] 2 Ch. 223.

⁷ *Metropolitan Bank of England and Wales v. Vivian & Co.*, [1900] 2 Ch. 654.

⁸ *Re Borax Co.*, [1901] 1 Ch. 326.

the debenture holders or trustees may take possession or appoint a receiver and upon possession being taken or the receiver appointed; also if the company go into liquidation, even though the provisions of the debenture only stipulate that the principal shall become payable on the company going into liquidation otherwise than for the purpose of reconstruction¹; but while the company is a going concern the charge does not crystallise merely by the happening of the events which entitle the debenture holder to intervene,² for "unless something has occurred entitling the debenture holders to make such an application" (*i.e.* an application to the Court for a receiver), "and the application has in fact been made, or an action brought by them or on their behalf to realise their security, or unless something has happened which entitles the debenture holders to determine their licence to the company to carry on their business, and they have actually done so, the company is entitled to do all the things which the licence entitles them to do."³ If, therefore, the company assign a book debt which is covered by the floating charge, it becomes the property of the assignee, and the receiver subsequently appointed cannot obtain priority by giving the debtor notice to pay to him after the assignment.⁴

"Floating" charges are recognised by the Acts, and are subject to two special incidents: (1) All such charges must be registered with the Registrar (Section 93, Sub-section 1 (*f*)); and (2) Since the 30th June, 1908, where the company is being wound up a floating charge created within three months of the commencement of the winding up is invalid except to the extent of the amount of any cash paid to the company at the time of or subsequently to the creation of and in consideration for the charge, with interest at five per cent., unless it is shown that the company was solvent immediately after the creation of the charge (Section 212: see page 564, *infra*, under title "UNDUE OR FRAUDULENT PREFERENCE.") .

To avoid the risk of being postponed to future charges by the creation of fixed mortgages on all or part of the property of the

¹ *Player v. Crompton & Co., Limited*, [1914] 1 Ch. 954.

² *Edward Nelson & Co. v. Faber*, [1903] 2 K. B. 376.

³ *Evans v. Rival Granite Quarries*, [1910] 2 K. B. 979, *per* Vaughan Williams, J. J., at page 986. At page 993 Fletcher Moulton, L. J., says, "Mere default on the part of the company does not change the character of the security, the debenture holder must actually intervene." At page 1002 Buckley, L. J., says, "No equity arises in a debenture holder whose security is a floating charge from his merely giving notice to seize a particular asset of the company. He must do something to turn his security from a floating into a fixed charge."

⁴ *Ind, Coope & Co., Limited*, [1911] 2 Ch. 223.

FIXED AND FLOATING CHARGES.

company, it has become common in the case of floating charges to insert a declaration that the company shall not have power to mortgage the property in priority to or equally with the charge created by the debentures, which will in general secure the priority of the debentures; but even in such a case the security may be defeated by a sale, even though it contain an option to the purchaser to require a re-purchase by the company,¹ or the security may become postponed to some extent to the claims of others, for until the charge becomes fixed a garnishor can obtain execution,² or a landlord may distrain,³ or the lien of a solicitor may attach and obtain precedence,⁴ and a creditor can set off a debt due from the company to him against one due from him to the company, although the former is secured by second debentures expressed to be subject to the floating charge,⁵ and while the charge remains an equitable one a subsequent mortgagee who completes his title by getting in the legal estate or giving notice to the debtors obtains priority if at the time of making his advance he did not know of the earlier charge,⁶ or did not know that the earlier floating charge contained a provision forbidding the creation of prior specific mortgages.⁷ A subsequent lender, who has no notice of the debentures, or of the fact that they forbid prior charges, taking a deposit of the title deeds, may also obtain priority, under the doctrine that where the mortgagor has ostensible authority to deal with the property all dealings with a *bond fide* mortgagee are valid.⁸ Even taking second debentures which contain a reference to the first debentures is not notice of the contents of the first debentures,⁹ so as to give notice that they contain the above provision.

If the debenture holders take steps promptly to enforce their security their rights under a floating charge to the property

¹ *Coveney v. Persse*, [1910] 1 Ir. R. 194. But this must not be a mere pretended sale which is in reality a mortgage (same case, and *Old Bush Mills Distillery, ex parte Bank of Ireland*, [1896] Ir. R. 301).

² *Evans v. Rival Granite Quarries*, [1910] 2 K. B. 970, *Robson v. Smith*, [1895] 2 Ch. 118. Where a sheriff, having seized property of the company, received payments on the terms that he should not sell, he was held entitled to retain these sums against a receiver subsequently appointed (*Robinson v. Burnell's Vienna Bakery*, [1904] 2 K. B. 624), but if the debenture holders intervene before the garnishor obtains his money, they will be preferred (*Norton v. Yates*, [1900] 1 K. B. 112).

³ *Roundwood Colliery Co.*, [1897] 1 Ch. 373.

⁴ *Brunton v. Electrical Engineering Corporation*, [1892] 1 Ch. 434.

⁵ *Edward Nelson & Co. v. Faber*, [1903] 2 K. B. 367.

⁶ *English and Scottish Trust v. Brunton*, [1892] 2 Q. B. 1, 700; *Coveney v. Pease*, [1910] 1 Ir. R. 194.

⁷ *Standard Rotary Machine Co.*, [1906] 95 L. T. 829, *Valletort Laundry Co.*, [1903] 2 Ch. 654.

⁸ *Re Castell and Brown*, [1898] 1 Ch. 316; *Perry Herriek v. Attwood*, [1858] 2 De G. & J. 12.

⁹ *Valletort Laundry Co.*, [1903] 2 Ch. 654.

comprised in their security take precedence over those obtained by an execution creditor, even after a sale by the sheriff, provided the money still remains in his hands¹; but where money has been paid to the sheriff on the terms that he shall not sell the property seized, he has been allowed to retain this against the receiver.² If an execution is put in, or garnishee order obtained, the trustees or debenture holders ought at once to give the sheriff notice to withdraw, or to the debtor not to pay the garnishor, and proceed to the appointment of a receiver, for if the security becomes a fixed one before the goods are sold or the debt paid the debentures will prevail.³

The equities of the debenture holder entitle him to oust the sheriff after he has seized if the security has crystallised before he has sold,⁴ or to deprive the garnishor of his advantage if the crystallisation of the security has taken place before he has collected the money⁵; but if the debenture security is allowed to continue to float, the execution creditor's or garnishor's right will prevail, and a garnishee order *nisi* will be made absolute notwithstanding the opposition of the debenture holder or a claim made by him on the debtor to pay the money direct to the debenture holder,⁶ for a debenture holder cannot single out and take a particular debt or piece of property while allowing the company to trade with the rest of its assets.⁷

Cases of considerable hardship have occurred where debenture holders have allowed a company to trade on credit, and have applied for a receiver only when the trade creditors were seeking to enforce their rights; but the rule that an execution creditor or garnishor takes subject to all equities affecting the debtor is well established,⁸ and the Court has been compelled, sometimes with great reluctance, to appoint a receiver, who takes possession of all the assets and leaves the unsecured creditors unsatisfied.⁹ The position of an execution creditor garnishing a debt owing to a company is not a favourable one, for if the debenture security has attached, not only is he postponed to debentures already issued,⁵ whether a receiver has or has not been appointed

¹ *Re Opera, Limited*, [1891] 3 Ch. 260; *Taunton v. Sheriff of Warwickshire*, [1895] 1 Ch. 734.

² *Robinson v. Burnell's Vienna Bakery*, [1901] 2 K. B. 624.

³ *Davey v. Williamson*, [1898] 2 Q. B. 194, as explained in *Evans v. Rival Granite Quarries*, [1910] 2 K. B. at page 1000; *Norton v. Yates*, [1906] 1 K. B. 112.

⁴ *Opera, Limited*, [1891] 3 Ch. 260; *Davey v. Williamson*, [1898] 2 Q. B. 195; *Duck v. Tower Co.*, [1901] 2 K. B. 314.

⁵ *Norton v. Yates*, [1906] 1 K. B. 112.

⁶ *Evans v. Rival Granite Quarries*, [1910] 2 K. B. 979.

⁷ *Robson v. Smith*, [1895] 2 Ch. 118, approved by C. A., [1910] 2 K. B. 989 to 1000.

⁸ *Standard Manufacturing Co.*, [1891] 1 Ch. 627, 641; *Opera, Limited*, [1891] 3 Ch. 260.

⁹ See the judgment of Buckley, J., in *London Pressed Hinge Co.*, [1905] 1 Ch. 576.

at the time his order is made absolute,¹ but even after the service of the garnishee order absolute on the company it can, for good consideration, issue debentures which take priority over the rights of the garnishor.²

It is usual and convenient, therefore, to create the security in such manner that the lands and immoveable property of the company are covered by a fixed charge (usually contained in a trust deed), while the stock-in-trade, chattels, and book debts of the company and its future property are included in a floating charge. The debentures usually specify in what events (such as liquidation, default in payment of principal or interest for a stated period, &c.) the charge is to be enforceable, and in interpreting these the Court will always lean against treating the charge on goods required for the business as being fixed while the business is going on,³ for where an intention appears that the company should receive and deal with the property charged it is assumed that only a floating security is intended.⁴

A charge though expressed in words which would suffice to create a fixed mortgage will be treated as a floating charge and be subject to preferential payments if it appears that it was intended that the company should continue to use the articles charged and turn them over in its business⁵; the principal tests whether a charge is floating were given by the Court of Appeal as follows: First, if it is a charge upon all of a certain class of assets, present and future; secondly, if the assets charged would in the ordinary course of business be changing from time to time; and, thirdly, if expressly or by necessary implication the company has the power, until some step is taken by the debenture holders or trustees, of carrying on its business in the ordinary way so far as regards the assets charged.⁶

Redemption of Debentures.—Irredeemable Debentures.

Debentures may be for a fixed term of years, or repayable on notice, or irredeemable.⁷ Unless debentures are permanent, or irredeemable, the debenture or trust deed fixes the date when or

¹ *Cairney v. Back*, [1906] 2 K. B. 746.

² *Geisse v. Taylor*, [1905] 2 K. B. 658, Div. Court (Kennedy, J., doubting).

³ *Government Stock Investment Co. v. Manila Railway*, [1897] App. Ca. 81; *Evans v. Rival Granite Quarries*, [1910] 2 K. B. 979.

⁴ *Illingworth v. Houldsworth*, [1904] App. Ca. 355.

⁵ *National Provincial Bank v. United Electric Theatres*, [1916] 1 Ch. 132.

⁶ *Houldsworth v. Yorkshire Woolcombers' Association*, [1903] 2 Ch. 284, affirmed in the House of Lords *sub nom.* *Illingworth v. Houldsworth*, [1904] App. Ca. 355, where it was held that a general charge on book debts, present and future, was a floating charge, although not expressed to be so, and required registration under the Act of 1900.

⁷ "Irredeemable" may mean, if the context so requires, "not liable to be called in," as well as "such that the company cannot claim to redeem the stock" (*Wiley v. Joseph Stocks & Co.*, [1909] 26 T. L. R. 41 and [1912] 2 Ch. 134, note).

the circumstances in which they are to be repaid, and upon such date or the happening of the specified event the company is liable to make immediate repayment of the principal amount secured. The terms of issue, however, often provide for the company having power to redeem at an earlier date upon giving notice, or for a sinking fund being created out of which the company is required to redeem an appropriate amount of the debentures from time to time, either by purchase in the market or by paying off particular debentures selected by drawings, or in some cases by paying off the debentures tendered for redemption at the lowest price. In all these cases the provisions of the deeds constituting the debentures must be carefully followed. The company may also purchase its own debentures, which thereupon become extinguished, but are capable of reissue in the circumstances mentioned below (see Reissue of Debentures, page 245, *infra*). If the debentures are purchased for less than their face value the difference constitutes a profit of the company, but such profit cannot be distributed as dividend unless there is a profit on the whole of the transactions of the company for the period in question,¹ and if the company is formed on the trust principle (*i.e.* keeping its capital account distinct from its revenue account) the profit on the purchase of the debentures must be treated as being an increment to capital and not as part of the income of the company.¹

Even if there is no express statement to that effect, the principal moneys will become payable upon the company going into liquidation,² and the charge will attach on the property as it exists at that time³: that is to say, the property can no longer be dealt with except subject to the charge. The right of the debenture holder to enforce his security also attaches if the company parts with the whole, or substantially the whole, of its undertaking and ceases to be a going concern,⁴ unless such a sale is authorised by its Memorandum of Association,⁵ but not if a company having several branches sells the undertaking of one branch only.⁶

If a debenture is expressed to be payable on or after a named date, the holder can, as soon as that date has passed, give notice

¹ *Wall v. London & Provincial Trust, per Younger, J.*, [1920] 1 Ch. 45, *per Sargant, J.*, [1920] 2 Ch. 582.

² *Wallace v. Universal Automatic Co.*, [1891] 2 Ch. 547. But the proposition has been disputed by some authorities.

³ *Panama Mail Co.*, [1870] 5 Ch. 318, *Colonial Trusts Corporation*, [1880] 15 Ch. D. 465; *Wallace v. Universal Automatic Co.*, [1891] 2 Ch. 547.

⁴ *Hubback v. Helms*, [1887] 56 L. J. Ch. 536.

⁵ *Re Borax Co.*, [1901] 1 Ch. 326.

⁶ *Metropolitan Bank of England and Wales v. Vivian & Co.*, [1900] 2 Ch. 654.

calling in the money, for it is then presently payable.¹ A proviso to a covenant to pay that the covenant shall be enforced only at the covenantor's option is void, and if the principal is expressed to be payable "on or after" a named date it becomes payable on that date.¹ If a debenture is payable upon the happening of an event within the control of the company it cannot by determining the event compel the debenture holder to accept immediate repayment.² But debenture holders cannot refuse to accept payment on the company being wound up compulsorily if this is one of the conditions for payment.³

Perpetual or irredeemable debentures are in effect the granting of an annuity in perpetuity to the holder, and special power should be taken in the Memorandum if it is desired to create annuities. In a case where there was no such power it was held before the Act of 1907 (which by Section 14 expressly authorised the creation of irredeemable debentures, and was retrospective) that the company could pay off at par a debenture expressed to be irredeemable.⁴

Under the ordinary law any provision in a debenture or trust deed which amounts to a clog or fetter upon the company's power to redeem the property charged, whether specifically or by way of floating charge, is void in the case of a company as completely as in the case of an individual.⁵ Thus, where a company deposited debentures with a provision that the lender might at any time within twelve months purchase the debentures at forty per cent. of their face value, the provision was held bad⁶; and this rule applies to an English contract to issue mortgage debentures comprising land situate in a country where the rule is unknown, and will be enforced by the Courts against any of the contracting parties within the jurisdiction⁷; but a debenture or other mortgage, even before the Act of 1907, might be made irredeemable for a limited reasonable time.

¹ *Tewkesbury Gas Co.*, [1911] 2 Ch. 270, affirmed [1912] 1 Ch. 1. The prospectus cannot be looked at to import other terms than those in the debenture (*sane case*).

² *General Motor Cab Co. No. 2*, [1912] 56 S. J. 673, but see the case next cited.

³ *Consolidated Gold Fields v. Sumner & Jack, Limited*, [1913] 82 L. J. Ch. 214, 108 L. T. 488.

⁴ *Southern Brazilian Rio Grande do Sul Railway*, [1905] 2 Ch. 78.

⁵ In the case of *De Beers Consolidated Mines v. British South Africa Co.* (1912, App. Ch. 52) Lord Atkinson, Lord Halsbury, and Lord Gorell expressed doubt whether this doctrine applied in the case of floating charges, but this doubt was dispelled in *Kreglinger v. New Patagonia Meat Co.*, [1914] App. Ch. 25.

⁶ *Samuel v. Jarral Timber Corporation*, [1904] App. Ch. 323. As to what constitutes a clog on the equity of redemption see *Noakes v. Rice*, [1902] App. Ch. 24; *Lisle v. Reeve*, [1902] App. Ch. 491; *Bradley v. Carritt*, [1903] App. Ch. 253; and *Briggs v. Hoddinott*, [1898] 2 Ch. 307.

⁷ *British South Africa Co. v. De Beers Mines*, [1910] 1 Ch. 354, [1910] 2 Ch. 502. Reversed on other grounds, [1912] App. Ch. 52.

For many years it was considered that no collateral advantage conferred as a term of the loan could extend beyond the period of the loan, but it is now held in the House of Lords that collateral advantages may be stipulated for and retained not only during the currency of the loan but after the repayment of the advance, provided that there is no unfair dealing and the retention of the collateral advantage does not prevent the mortgagor getting back the mortgaged property free from restrictions.¹ Thus, where by the terms of the debentures the holders were entitled to receive one third of the surplus assets of the company in the case of a winding up, this term was held to be enforceable although the debentures had in the meantime been paid off and extinguished.² Any attempt, however, to prevent the borrower from getting back his property in as good a state as when it was charged, will fail³; but it was held before the Act of 1907 that this did not render it impossible, if the Memorandum contained the necessary power,⁴ to create a perpetual debenture, for that is, in fact, merely an annuity which may be granted by appropriate words, and the annual payments may be charged on the company's property; but, as pointed out by Lord Lindley, an irredeemable debenture is not a mortgage at all.⁵ If the word "redeemable" is applied to such a perpetual annuity it means repurchasable.⁶ Section 103 (re-enacting Section 14 of the Act of 1907) now declares that a condition in any deed or debenture, whether issued or executed before or after the passing of the Act, shall not be invalid by reason only that thereby the debentures are made irredeemable, or redeemable only on the happening of a contingency however remote, or a period however long.

The word "irredeemable" applied to debentures would *prima facie* have the meaning that the company has no power to redeem or pay them off, but it is frequently used with the intention of describing debentures of which the holder cannot demand repayment, even though the company may at its option redeem them. The context may be sufficient to establish this latter meaning⁶;

¹ *Kreglinger v. New Patagonia Meat Co.*, [1911] App. Ca. 25. This decision is in conflict with some earlier decisions and should be noted as a new departure.

² *Re Cuban Land Co.*, [1921] 2 Ch. 147.

³ See case cited in note ⁶ on previous page. The British South Africa Company's case (see note ⁷ on previous page) was to the same effect as decided in the Court of Appeal; but the House of Lords held that the advantage conferred on the De Beers Company was not a term of the mortgage, and therefore might continue after redemption.

⁴ Without such power the so called irredeemable debenture may be paid off at par in liquidation (*Southern Brazilian Rio Grande do Sul Railway*, [1905] 2 Ch. 78). It is not clear that the Act of 1907 removes the necessity for having authority in the Memorandum to issue irredeemable debentures; the fact will still remain that they do not create mortgages, but rather perpetual annuities (see next note).

⁵ *Samuel v. Jarrath Timber Corporation*, [1901] App. Ca. 330; *Edinburgh Corporation v. British Lunen Bank*, [1913] App. Ca. 133; see also *Attree v. Hawe*, [1878] 9 Ch. D. 337, 340.

⁶ *Wiley v. Joseph Stocks & Co.*, [1912] 2 Ch. 134, note. This case was decided in 1909 (see 26 *Times L. R.* 41).

but it is not proper in such a case to use the word "irredeemable," and "perpetual" should be substituted. Stock which is expressed to be "redeemable at the option of the company" is not repayable on the demand of the holder.¹

Debentures to Bearer.

Debentures payable to bearer are very common. According to the general law of England a debt cannot be assigned by delivery of the document which creates or evidences the debt; but there is an exception in certain cases where the law merchant makes such an assignment valid (*e.g.* in the case of a bill of exchange); and it has been held by Kennedy, J., and Bigham, J., that the custom to treat debentures to bearer as negotiable by delivery is sufficiently proved to take effect under the law merchant, of which custom judicial notice will now be taken without express evidence²; and even without reference to the law merchant it had previously been held that, by a doctrine of estoppel, a company may be prevented from denying its liability to pay a debenture if it has invited persons to accept a transfer by delivery, and has held out or represented that the debenture so transferred gives the bearer a right to be paid; and equally that a declaration in the debenture that the delivery of the bond to the company will be a valid discharge to it, for payment will bind the original and intermediate holders. The cases which deal with this subject are numerous: some of the most important are referred to in the foot-note.³ Debentures can accordingly be framed so as in effect to be payable to bearer. Section 106 expressly authorises the creation of debentures to bearer in Scotland, treating their validity in England and Ireland as not requiring any express notice.

Debenture Stock.

Debenture stock is of the same nature as ordinary debentures,⁴ except that, instead of each bond securing a definite amount, the whole sum secured is treated as a single stock, and certificates are issued declaring the holder to be entitled to a definite sum, part of the stock. This sum is not necessarily a round sum, but may be for any number of pounds, and may include fractions of a pound unless express limitation is made in that respect. The debenture

¹ *Edinburgh Corporation v. British Linen Bank*, [1913] App. Ca. 134.

² *Bechuanaland Exploration Co. v. London Trading Bank*, [1898] 2 Q. B. 658; *Edelstein v. Schuler & Co.*, [1902] 2 K. B. 144.

³ *Re Agra and Masterman's Bank*, [1867] 2 Ch. 307, *re Blakeley Ordnance Co.*, [1868] 3 Ch. 154, *Natal Investment Co.*, [1868] 3 Ch. 361; *re Imperial Land Co.*, [1871] 11 Eq. 487; *Goodwin v. Roberts*, [1876] 1 App. Ca. 476, *Eaglesfield v. Londonderry*, [1877] 4 Ch. D. 693; *Romford Canal Co.*, [1883] 21 Ch. D. 85. The case of *Crouch v. Crédit Foncier* (1873, L. R. 8 Q. B. 385) must now be taken to be overruled.

⁴ Debenture stock passes under a bequest of "all my debentures" (*Morrice v. Aylmer*, [1875] L. R. 7 H. L. 717; *Murray v. Herring*, [1906] 2 Ch. 493).

stock may be repayable at a fixed date, or may be irredeemable,¹ according to the deed creating it, and may be secured in any manner in which a debenture may be secured. The loans of railway companies under the special Statutes governing such companies are almost invariably in the form of stock, and are usually perpetual; but it must be noted that debentures of companies (*e.g.* railways) formed under The Companies Clauses Act, 1845, have not the same effect as those of companies formed under The Companies Acts, for they only entitle the holders to have a receiver appointed, and the land and property charged cannot be seized and sold.² The same rule applies to companies carrying on a public undertaking, although not formed under the Companies Clauses Acts: *e.g.* a water company³ or a tramway.⁴

In the case of such debenture stock the position of a debenture stock holder is that of an annuitant, and so long as his interest is not in arrear he cannot take proceedings to interfere in the conduct of the business of the company, even if he alleges that the capital moneys of the company are being improperly disposed of.⁵

Debenture stock is often made to be irredeemable, following the practice in the case of railway companies in this respect: that is to say, the money is raised by the sale of a perpetual annuity, and this again may be qualified by giving the company power at its option to repurchase such annuity⁶; but sometimes the division of the principal money into stock instead of fixed amounts is effected, although repayment is to be made in the same manner as with ordinary debentures.

Interest on Debentures.

At Common law interest is not payable on a debt except by agreement.⁷ The debenture must therefore contain a covenant to pay interest, and should provide that if the capital is not paid at the due date interest shall continue to be payable at the agreed rate; otherwise, though interest may be recovered as damages for nonpayment of the principal, it will only be allowed at the merchantable rate, say four or five per cent., or at the rate previously paid, whichever is less.⁸ If no place is named for the payment of the principal it is the duty of the Company

¹ That is, may be in the form of an annuity (see pages 233 and 235, *supra*).

² *Gardner v. London, Chatham, and Dover Railway Co.*, [1867] 2 Ch. 201, *re* *Herne Bay Co.*, [1879] 10 Ch. D. 42.

³ *Blaker v. Herts and Essex Waterworks*, [1880] 41 Ch. D. 399.

⁴ *Marshall v. South Staffordshire Tramways*, [1895] 2 Ch. 36.

⁵ *Lawrence v. West Somerset Mineral Railway*, [1918] 2 Ch. 250, *Cross v. Imperial Continental Gas Association*, [1928] 2 Ch. 553.

⁶ *Edinburgh Corporation v. British Linen Bank*, [1913] App. Ca. 133.

⁷ *Higgins v. Sargent*, [1823] 2 B. & C. 348, *Page v. Newman*, [1829] 9 B. & C. 378.

⁸ *Price v. Great Western Railway*, [1847] 16 M. & W. 244, *re Roberts*, [1880] 14 Ch. D. 40; *Mollersh v. Brown*, [1890] 45 Ch. D. 225.

as debtor to find and pay the debenture holder.¹ If the debenture holder does not produce his debenture for payment, or being an executor does not produce probate, interest will continue till actual payment, even if there is a delay of years.²

The interest on debentures is a debt, and, although usually expressed to be payable half-yearly, accrues *de die in diem*.³ It is payable whether there are or are not profits, and, although such interest is usually to be charged against income account before arriving at the profit for the year, interest paid on capital borrowed for constructing works may during the period of construction properly be added to the capital and treated as part of the cost of construction.⁴ It has also been held that where interest on debentures has been paid out of capital, there being no profits, the company need not make good the capital expended before paying dividends.⁵

It is usually declared that if default is made in paying interest for a specified time the principal shall become immediately payable.

If debenture holders recover judgment for their principal and interest the debt is merged in the judgment, which thereafter carries interest at four per cent, whatever the amount payable under the debentures.⁶

Sometimes, however, interest is declared to be payable only out of profits, in which case the company must apply all available profits for this purpose, and not set aside any part as reserve until the interest is paid in full.⁷ Such debentures are usually called "income bonds."

When a receiver is appointed the moneys available are applied, first in paying interest due, and the balance in repaying the capital, although, if the debenture holders so require, they may have the moneys received applied in repaying capital in the first instance, which will be to their advantage if there is a deficiency, for these payments do not bear income tax; and further, if the arrears of interest are not the same in all cases, each debenture holder proves for the aggregate amount due to him for principal and interest⁸ (see page 253, *infra*).

¹ See *Thorn v. City Rice Mills*, [1889] 40 Ch. D. 357.

² *Fowler v. Midland Electric Corporation*, [1917] 1 Ch. 527, and in C. A., [1917] 1 Ch. 636. From the judgment of Eve, J., it appears that the contract was to pay interest till the principal was paid (see page 538).

³ Apportionment Act, 1870, Sections 2 and 5, *re* *Rogers*, [1863] 1 Dr. & Sm. 338.

⁴ *Hinds v. Buenos Ayres Grand National Tramways*, [1906] 2 Ch. 654.

⁵ *Bosanquet v. St. John del Rey Mining Co.*, [1897] 77 L. T. 206, but see *Dovey v. Cory*, [1901] App. Ca. 477.

⁶ *European Central Railway*, [1876] 4 Ch. D. 33.

⁷ *Heslop v. Paraguay Central Railway*, [1910] 54 Sol. J. 234.

⁸ *Re Midland Express, Limited*, [1914] 1 Ch. 41.

Issue of Debentures.

A public company registered since 1900 may not exercise the right to borrow money or issue debentures until it is entitled to commence business (Section 87: see page 167, *supra*).

The issue of debentures is made by the directors, who cause the seal of the company to be affixed to the documents, and deliver them to the allottees when the full amount is paid to the company. Debentures sealed but not delivered are not "issued."¹ But the word "issue" has not a technical meaning, and debentures agreed to be issued will be treated as issued.² If payment in full is not made at once, scrip certificates are often issued declaring that the holders are entitled on payment of the balance to have formal bonds issued to them.³

There is very frequently a prospectus offering the debentures, but if any question arises as to the meaning of the terms of the debentures, no reference can, as a rule, be made to such a prospectus: the provisions of the debentures alone must be considered.⁴ But the offer by the prospectus will create an equitable charge in favour of those who have paid their money if it is clearly stated what property is to be charged, but not if this is left uncertain, as, for instance, by merely referring to mortgage debentures.⁵ This charge, however, will require registration and will be superseded by the debentures as soon as issued.

If a creditor has an option to receive debentures for his debt he may call for them at any time, even after judgment in the debenture holders' action, and they will rank equally with the other debentures.⁶

Section 92 requires that the debentures or certificates of debenture stock shall be complete and ready for delivery within two months after allotment or registration of any transfer.⁷

¹ *Mowatt v. Castle Steel and Iron Works*, [1887] 34 Ch. D. 58; *Levy v. Abercrombie Slate and Slab Co.*, [1887] 37 Ch. D. 260; *Derby Canal Co. v. Wilmot*, [1808] 9 East 300 (see page 103, *supra*).

² *Porth Electric Tramways*, [1906] 2 Ch. 216, citing *Levy v. Abercrombie Slate and Slab Co.*, [1887] 37 Ch. D. 264. See also *Dey v. Rubber and Mercantile Corporation*, [1923] 2 Ch. 528, in which it was held that a debenture holder in equity was entitled to the rights of debenture holders, *e.g.* to vote.

³ Such scrip in the case of mortgage debentures creates an equitable charge, and requires registration.

⁴ *Tewkesbury Gas Co.*, [1911] 2 Ch. 279; [1912] 1 Ch. 1; *British Equitable Assurance Co. v. Baily*, [1906] App. Ch. at pages 38, 41. A debenture *prima facie* contains the whole contract. As to the circumstances in which a prospectus may form part of the contract, or constitute a binding collateral contract, see page 30, *infra*, and *Jacobs v. Batavia and General Plantations Trust*, [1924] 1 Ch. 287, [1924] 2 Ch. 320.

⁵ *New Durham Salt Co.*, [1890] 2 Meg. 360.

⁶ *Peggie v. Neath District Tramways*, [1898] 1 Ch. 183.

⁷ For penalty in case of default see page 183, *supra*.

The applications for and allotment of debentures are usually made in the same manner as in the case of shares; but the provisions of the Act as to a minimum subscription in case of shares do not apply to an issue of debentures.

The same rules apply in the case of shares and debentures for ascertaining when the contract for the issue is complete, with the exception, however, that contracts relating to mortgage debentures are not binding unless in writing, if the mortgage creates an interest in land, and so brings the transaction within the Statute of Frauds.¹ Shares, on the other hand, are personal property.

Before 1907 the Courts would not grant specific performance of an agreement to make a loan, even in the form of taking debentures, so that if an applicant went back from his bargain the remedy of the company was in damages only, which may be very difficult to prove.² Section 16 of the Act of 1907 and Section 105 of the Act of 1908, however, make a contract with a company to take up and pay for debentures of the company enforceable by an order for specific performance; but if under the conditions of allotment the company forfeits the debentures for nonpayment of an instalment the right to enforce specific performance is lost.³ The position of an applicant for debentures who makes default in paying up the balance is not, however, a good one. As he is not willing to perform his part of the bargain, it seems that he has no right to compel the company to carry out the contract by giving him security or paying him interest.⁴ *Astbury, J.*, in a case in which *Bass v. Clivley*⁵ was not cited, however, held that debenture holders who were in default as regards payment of instalments should, on a distribution being made among the debenture holders, be paid rateably according to the amounts they had paid up without first paying up the balance of the debentures held by them.⁶ Where a loan has been made, specific performance of the agreement to give security will be decreed,⁷ and an agreement to issue debentures for money paid creates a charge, although the debentures are not actually issued.⁸ An agreement to issue

¹ *Driver v. Broad*, [1893] 1 Q. B. 539, 744.

² *South African Territories v. Wallington*, [1898] App. Ca. 309.

³ *Kuala Pulu Estates v. Mowbray*, [1915] 111 L. T. 1072.

⁴ *Bass v. Clivley*, [1820] Tamlyn 80.

⁵ *Seaver v. Smelting Corporation*, [1915] 1 Ch. 472.

⁶ *Hermann v. Hodges*, [1873] 16 Eq. 18.

⁷ *Strand Music Hall*, [1865] 3 D. G. J. & S. 147; *Pegge v. Neath Tramways*, [1896] 1 Ch. 183; *re Queensland Land and Coal Co.*, [1894] 3 Ch. 181; *Simultaneous Printing Syndicate v. Fowleraker*, [1901] 1 K. B. 771; *Perth Electric Tramways*, [1906] 2 Ch. 216.

debentures when the power arises will be enforced though there was no present power when the agreement was made.¹

If directors take an agreement to issue debentures to themselves for loans made, but do not procure the execution and registration of the debentures until shortly before liquidation, their security may be void under the bankruptcy laws.²

Debentures must be executed and issued in accordance with the regulations of the company, and if any irregularity is apparent on the face of them their validity will be affected, but if apparently in order the holder need not inquire whether all formalities have been complied with.³ A provision in the Articles of Association that irregularities shall not affect the debentures will protect a *bonâ fide* holder of a debenture issued under such circumstances that the holder might have discovered the irregularity,⁴ but not one with notice of the irregularity.⁵

Where debentures are issued creating a charge, it is almost always the custom to declare expressly that the charges created by all the debentures of the series are to rank equally, and without priority one over another. If this is omitted, each debenture creates a charge ranking in priority to all others issued subsequently, but postponed to all issued before it.⁶

Successive series of debentures also rank in the order of their issue, and each series is postponed to any mortgages or charges, whether in the form of debentures or otherwise, created before it, and takes priority over all such mortgages or charges created after it,⁷ subject, however, to the power of a company described at page 228, *supra*, to create a specific charge ranking in priority to an earlier floating charge, unless forbidden by the terms of the earlier deed. A particular case should be noted. Mortgages and debentures are often created in favour of banks and others to secure a floating balance or current account. In such a case if a subsequent mortgage is created on the same property and the

¹ Bagnalstown and Wexford Railway, [1870] Ir. R. 4 Eq. 505.

² Jackson v. Bassford, Limited, [1906] 2 Ch. 467.

³ County of Gloucester Bank v. Rudry Methyr Co., [1895] 1 Ch. 629; Romford Canal Co., [1883] 24 Ch. D. 85. This will not render a company liable on a *forged* debenture (Ruben v. Great Fingall Consolidated Co., [1904] 2 K. B. 712, [1906] App. Ca. 430).

⁴ Davies v. R. Bolton & Co., [1894] 3 Ch. 678.

⁵ Worcester Corn Exchange Co., [1864] 3 De G. M. & G. 480, Davis's Case, [1870] 12 Eq. 570.

⁶ Gartside v. Silkstone Co., [1882] 21 Ch. D. 762, Howard v. Patent Ivory Co., [1888] 38 Ch. D. 156, 171; Lister v. H. Lister & Sons, [1893] 68 L. T. 826.

⁷ Where the charge in debentures was expressed to be "subject to any mortgages which may hereafter affect the property," and a second issue was made with a floating charge and a declaration that "all the debentures of this and the first series shall rank *pari passu*," it was held that the second issue was postponed to the first (Marshall v. Benjamin Cope & Sons, [1914] 1 Ch. 800).

bank or other lender entitled to the prior security has notice of such subsequent mortgage¹ he cannot make further advances upon his own security to the prejudice of the later mortgagee, and, further, if he continues the current account, payments made by the debtor company will go in reduction of the debt existing at the time of the later mortgage,² so that in course of time the bank or lender on current account will become postponed to the later lender, for all subsequent advances will rank after the amount advanced by the later lender.³ To meet this danger banks usually rule off and close the current account as soon as they learn of the subsequent mortgage, thus retaining their charge for the balance then due on current account.

Unlike shares, debentures may be issued at a discount: *e.g.* a debenture for £100 may be issued in consideration of £95 advanced to the company, the effect of the discount being an addition to the interest paid,⁴ and commission may be paid to underwriters or others for placing or guaranteeing the taking up of debentures. But a provision that debentures issued at a discount may be exchanged for fully paid shares at par is illegal and void,⁵ and, equally, bonus shares must not be given to subscribers for debentures, at any rate to any greater amount than what may fairly be called commission. If they are given, the holder will be liable for calls.⁶

If a commission is paid or discount allowed in respect of debentures, the total amount must be stated in the Annual Summary filed next after making the payment or allowance (Section 26, Sub-section 2 (*f*)), and the amount remaining unwritten off must be stated in each balance sheet of the company (Section 90), and a statement of the amount or rate of the commission or discount included in the particulars filed with the Registrar under Section 93, Sub-section 4; but failure to comply with the last-mentioned provision will not affect the validity of the debentures. The amount of commission payable for placing debentures, or

¹ It seems that registration of the later mortgage will be notice of its existence to the earlier mortgagee (see page 281, *infra*).

² Under what is known as the rule in *Clayton's Case*, [1816] 1 Mer. 527, see also next note.

³ *Deeley v. Lloyd's Bank*, [1912] App. Ca. 756, *Hopkinson v. Rolt*, [1861] 9 H. L. C. 514, *London and County Bank v. Ratchiffe*, [1881] 6 App. Ca. 722, *Bradford Banking Co. v. Briggs*, [1886] 12 App. Ca. 20.

⁴ *Anglo-Danubian Steam Co.*, [1875] 20 Eq. 339; *Campbell's Case*, [1877] 4 Ch. D. 470; *Webb v. Shropshire Railway Co.*, [1893] 3 Ch. 307.

⁵ *Moseley v. Koffyfontein Mines*, [1904] 2 Ch. 108.

⁶ In *re Railway Time Tables* (1894, 62 L. J. Ch. 935, 68 L. T. 640) shares to the amount of £10 were issued as fully paid for each £10 debenture. *Kekewich, J.*, held that the allottee was liable for the amount of the shares. There was an appeal, which went to the House of Lords on other points (*Welton v. Saffery*, [1897] App. Ca. 290), but this point was not further discussed.

which has been paid during the preceding two years, will also need to be stated in every prospectus (Section 81, Sub-section 1 (h)).

It is a common practice to issue debentures repayable with a premium: *i.e.* a debenture of £100 is only to be satisfied by paying, say, £105. In such a case the limit (if any) of the borrowing power must be carefully considered to see that the limit is not exceeded: *e.g.* if the words be, "Provided that the amount secured shall not exceed £10,000," the bonus must be included in estimating the amount secured.¹ But it would seem that if the words be, "Provided that the amount borrowed shall not exceed £10,000," the bonus need not be included. On the other hand, it is not uncommon to issue debentures at a premium: *e.g.* a debenture for £100 is only issued on payment of £105. It is submitted that in such a case, if the words of limit are, "The amount raised or borrowed shall not exceed £10,000," the premium forms part of the amount raised; and this inference would be stronger if, in addition, the debenture is only repayable at £105 or more, for in such a case the real transaction is that £105 is borrowed and will be repaid, although interest is only payable on £100. (As to duty on debentures see Appendix B, *infra*.)

Debentures may be issued in respect of an existing debt,² and even when there is no power to mortgage the company may give to a creditor who is in a position to levy execution a charge to secure his debt.³ Title deeds or debentures may also be deposited to secure an existing debt.⁴

"Debenture stock," says Lord Lindley, "can be mortgaged as well by the company which issues it as by an ordinary holder"⁵: that is to say, debentures or debenture stock may be deposited as security for a loan to a larger nominal amount than the loan. In such a case the holders rank for dividend upon the face value of the debentures held by them until their whole loan is paid off⁶; and where debentures expressed to carry interest are deposited as security, the security is good up to the amount of the principal and the interest unpaid on the debentures, even though the company is in liquidation⁷. There is a danger that debentures thus deposited may pass into the hands of a *bona fide*

¹ Rowell & Son v. Commissioners of Inland Revenue, [1897] 2 Q. B. 194.

² Howard v. Patent Ivory Co., [1888] 38 Ch. D. 160, Seligman v. Prince, [1895] 2 Ch. 617.

³ Stag v. Medway (Upper) Navigation Co., [1903] 1 Ch. 189.

⁴ Re Patent Fide Co., [1871] L. R. 6 Ch. 83.

⁵ Samuel v. Jarrak Timber Corporation, [1904] App. Ct. 330.

⁶ Regent's Canal Ironworks Co., [1876] 3 Ch. D. 43, W. Tasker & Sons, Limited, [1905] 2 Ch. 598, Perth Electric Tramways, [1906] 2 Ch. 216.

⁷ Re Vmt, [1905] 1 Ir. R. 112.



purchaser, who, if he has no notice that they were deposited to secure a smaller sum, may recover upon them their full face value.¹

Debentures are sometimes issued by way of security with blanks for the names of the holders; but the practice is uncommon, as the Commissioners of Inland Revenue require such instruments to be stamped as debentures payable to bearer. Such bonds are not complete, and do not give the recipient a legal title; but the contract to issue them which is implied will be made effectual in equity and protect the owner,² and when the loan they secure is paid off the debentures are exhausted; but their re-issue is now lawful under Section 104 (see *infra*).

The issue of debentures is a giving of security which may be a fraudulent preference if the company is wound up within three months, and Section 212 expressly deals with floating charges created within that period (see page 230, *supra*, and 567 *infra*).

Cancellation and Re-Issue of Debentures.

It frequently happens that a company, after making an issue of a series of debentures, pays off or purchases some of the debentures and subsequently re-issues the same debentures, or other debentures in place of them, expressed to rank equally with the outstanding debentures of the series. It was, however, held that this was not legitimate unless, by the terms of the original issue of debentures, power was reserved to the company to make a re-issue. Thus, where a company having bought and taken a transfer to itself of debentures, then re-sold them, it was held that the purchasers had no right to rank with the other debenture holders of the series,³ and the same result followed if the debentures had been issued as security for a loan which was paid off, and were then re-issued,⁴ even though the original issue was only by the deposit of the debentures in blank (*i.e.* without the name of the holder or the date),⁵ for such a deposit creates a charge on the assets of the company.⁶ Where a company deposited debentures to secure the amount which should be due on closing an account with a bank, and when this sum stood at £85,000 borrowed £500, which it was agreed orally should be

¹ *Robinson v. Montgomery Brewery*, [1896] 2 Ch. 841.

² *Re Strand Music Hall Co.*, [1865] 3 De G. J. & S. 147, *Davis v. Martin*, [1894] 3 Ch. 181.

³ *George Routledge & Sons, Limited*, [1904] 2 Ch. 471.

⁴ *W. Tasker & Sons, Limited*, [1905] 2 Ch. 587.

⁵ *Re Perth Electric Tramways*, [1906] 2 Ch. 216.

⁶ *Re Strand Music Hall*, [1865] 3 De G. J. & S. 147, *re Regent's Canal Ironworks Co.*, [1876] 3 Ch. D. 43.

charged on the debentures, and then paid off the £85,000, it was held that the debentures were "spent," and could not be recharged with the £500, which was held not to be part of the current account, but a fresh loan.¹ It appeared also from the judgments in the cases cited that not even by taking a transfer into the names of trustees, nor by any other means, could a company purchasing or paying off its own debentures keep them alive, for the debt was in either case extinguished and the security dead.

So common had been dealings of the character described, and so great was the injustice of invalidating debentures held by persons who had no knowledge that they had been the subject of a previous issue, that the Legislature (by Section 15 of the Act of 1907, re-enacted in Section 104 of 1908) dealt with the whole matter, enacting retrospectively as well as for the future that where, *either before or after the passing of the Act*, a company has redeemed debentures previously issued it shall (subject to the exceptions below mentioned) have power, *and shall be deemed always to have had power*,² to keep the debentures alive for the purposes of re-issue, and where any company has purported to exercise this power³ it is entitled to re-issue the debentures either directly or by issuing others in their place, and on the re-issue the holder "shall have, and shall be deemed always to have had, the same rights and priorities as if the debentures had not previously been issued," thus keeping their right to be treated as part of the same issue and not becoming postponed to second mortgage debentures issued in the meantime.⁴

The only exceptions are if the Articles of Association of the company or the conditions of issue of the debentures "expressly otherwise provide" (words which may give rise to difficulty⁵), or if "the debentures have been redeemed in pursuance of any obligation on the company so to do (not being an obligation enforceable only by the person to whom the redeemed debentures

¹ *London Investment Trust v. Russian Petroleum and Liquid Fuel Co.*, [1907] 2 Ch. 540.

² The words in italics make the section retrospective, but Sub-section 5 declares that the section is not to prejudice any judgment or order obtained before the 7th March, 1907, as between the parties to the proceedings in which it was obtained. A Winding-up Order does not fall within this provision so as to invalidate debentures re-issued previously (*New London and Suburban Omnibus Co.*, [1905] 1 Ch. 621).

³ It is very difficult to say how a company "purports to" keep debentures alive; but it is apparently a condition of its power to re-issue them, and if the company has merely paid off some of its debentures and done nothing more it can hardly be said to have "purported" to keep them alive. The making of a transfer of debentures to trustees would no doubt be sufficient.

⁴ *Fitzgerald v. Porsse, Limited*, [1908] 1 Ir. R. 279.

⁵ *E.g.* there may be found in the debentures words obviously inconsistent with a re-issue being made, yet not "expressly" forbidding it. Will a re-issue then be lawful?

were issued or his assigns)": that is to say, if the debentures are redeemed in pursuance of a general obligation to pay off so many per annum, or as part of an obligatory scheme for creating a sinking fund, they will not be re-issuable; but if paid off because the due date has arrived,¹ or because, having been deposited to secure a temporary advance, the loan has been called in, and the company has purported to keep them alive, the debentures may be re-issued; for in these latter cases the repayment is made in pursuance of "an obligation enforceable only by the person to whom the redeemed debentures were issued, or his assigns."

Sub-section 2 declares that where debentures have been transferred, either before or after the passing of the Act, to a nominee of the company with the object of keeping them alive, a transfer from that person shall be deemed to be a re-issue.

Sub-section 3 provides that where the company has, either before or after the passing of the Act, deposited any of its debentures to secure advances from time to time on current account or otherwise, the debentures shall not be deemed to have been redeemed by reason only of the account of the company having ceased to be in debit. This is to meet the case of deposits with banks and the like. Thus, if a company deposits, say, debentures for £10,000 to secure its overdraft of varying amount, and its account is for a while in credit, and then again in debit, the security will be good as against the new debit, and there will be no re-issue requiring a fresh stamp.

Sub-section 4 requires a re-issued debenture to be stamped as if it were an issue of a new debenture,² but the holder of a re-issued debenture which appears to be duly stamped may give it in evidence in any proceedings for enforcing his security without payment of the stamp duty or penalty unless he had notice, or, but for his negligence, might have discovered, that the debenture was not duly stamped³; but in any such case the company is liable for the proper stamp duty and penalty.

Nothing in the section is to prejudice any power to issue debentures in the place of any debentures paid off, or otherwise satisfied or extinguished, reserved to a company by its debentures or the securities for the same (Sub-section 5). In other words, the powers given by the Act and the debentures are cumulative.

¹ If there is a covenant with trustees for debenture holders to pay off the whole issue at the due date it may be that this will prevent them from falling within the exception, for then there is an obligation enforceable by the trustees.

² The usual practice is to issue new documents instead of having the redeemed debentures re-stamped. The amount of stamp duty is the same in either case.

³ That is in effect unless he knew or ought to have known that his debenture was one that had previously been issued and redeemed.

Transfer of Debentures.

Debentures are usually transferred by a form of transfer similar to that used for transferring shares, and executed in the same manner. It is not, however, necessary, although it is usual, for the purchaser to execute the deed.

Where debentures do not contain a charge they are simply debts, and can be transferred by a writing not under seal, and an oral agreement to sell them can be enforced. But if they contain a charge on freehold or leasehold property they create an interest in land, and require to be transferred by deed under seal, and any agreement to sell such a debenture must be in writing, so as to satisfy the Statute of Frauds.¹ The title to a debenture payable to bearer passes by delivery upon the principle explained on page 237, *supra*.

It is common to provide that debentures may be transferred "free from equities between the company and the original or any intermediate holder." Without these words the holder of a chose in action can only transfer such rights as he has, and if the company has any set-off against the transferor it can enforce it against the transferee.² These words will effectually negative any such right where the transfer is complete; but an equitable mortgagee of debentures will be subject to any equities existing at the time he gives notice of his mortgage, so that a debt then due but not payable may be set off against the debenture debt,³ and he will be postponed to the company's claim if it is declared that only the title of the registered holder will be recognised,⁴ and if the transfer, although complete, is only upon a trust, the company can insist upon any set-off or equity which it has against the *cestui que trust*.⁵ If the conditions authorise transfers the company cannot refuse to register a transfer, and the transfer may be made after liquidation or judgment in a debenture holder's action as well as before, and the same rule as to equities will then prevail, for the claim of the general body of debenture holders under their charge is no greater than that of the company against the particular debenture holder who holds the transferred debenture.⁶

A transfer made by one of several joint holders who forged the names of the others is void and of no effect.⁷

¹ *Driver v. Brond*, [1893] 1 Q. B. 539, 744.

² *Re Smith*, [1901] 1 Ir. R. 73; *Gwelo Matabeleland Exploration Co.*, [1901] 1 Ir. R. 38.

³ *Christie v. Taunton Belmont & Co.*, [1893] 2 Ch. 175.

⁴ *Re Smith*, [1901] 1 Ir. R. 73.

⁵ *Re Brown and Gregory*, [1904] 1 Ch. 627, [1904] 2 Ch. 448.

⁶ *Farmer v. Goy & Co.*, [1900] 2 Ch. 140. But see *Palmer's Decoration Co.*, [1904] 2 Ch. 743.

⁷ *Cottam v. Eastern Counties Railway Co.*, [1860] 1 Joh. & H. 243, 30 L. J. Ch. 217.

Debentures may be disposed of by will, and on an intestacy or bankruptcy pass to the legal personal representative, but, being things in action, are not within the reputed ownership provision of Section 38 of The Bankruptcy Act, 1914.¹

Exchanging Debentures for Shares.

Sometimes by the terms of the issue of debentures it is provided that the holder shall have the option of exchanging them for fully paid shares. This has been much facilitated by the repeal of Section 25 of the Act of 1867, for there is now no reason why shares should not be paid up by the extinguishment of a future debt. A contract, however, seems to be necessary under Section 88 in any case where there is not a money payment or a set-off. If the debentures have matured before the option is exercised, there may be an immediate set-off, and no contract need then be filed.² But an option to exchange debentures issued at a discount for fully paid shares of equal face value is illegal, for by this means the shares will not have been paid for in full,³ and where a bonus is payable on debentures only out of profits, and there are no profits, the bonus must not be satisfied by an issue of fully paid shares.⁴

Enforcing Debentures and Realising the Security.—Foreclosure.—Sale.

If default is made in the payment of the principal or interest secured by mortgage debentures,⁵ the holders have all the remedies which mortgagees would have in like circumstances: *i.e.* they may sue on the covenant to pay; they may obtain a receiver of the rents and profits, or apply for a sale of the mortgaged property⁶; or they may, if the whole of the debenture holders are parties to the action,⁷ proceed by way of foreclosure⁸; or the trustees, if they have the legal estate or a power to enter, may take possession. In each case the debenture and trust deed (if any) must be consulted to see, first, whether there has really been a default, and, secondly, what remedies are available without the assistance of the Court, and what require an action to be commenced. The strict performance

¹ *Ex parte Rensberg, re Price*, [1876] 4 Ch. D. 685.

² *Spargo's Case*, [1873] 8 Ch. 407. *Larocque v. Beauchemin*, [1897] App. Ca. 353.

³ *Moseley v. Koffylontem Mines*, [1904] 2 Ch. 108.

⁴ *Bury v. Funatana Corporation*, [1910] App. Ca. 430.

⁵ The company cannot by making default compel debenture holders to accept immediate repayment (*General Motor Cab Co. No. 2*, [1912] 56 S. J. 573).

⁶ An action by one debenture holder for a receiver in the Chancery Division is no impediment to an action by another debenture holder in the King's Bench Division for the payment of arrears of interest (*Clearly v. Brazil Railway Co.*, [1915] W. N. 178, 113 L. T. 90).

⁷ *Elias v. Continental Oxygen Co.*, [1897] 1 Ch. 511.

⁸ *Oldrey v. Union Works*, [1895] W. N. 77.

of all conditions is of the utmost importance, for without this the powers conferred on the trustees cannot be exercised nor will any order be made by the Court for the appointment of a receiver or administration of the trust: for instance, if payment is stipulated to be made at a certain time and place, the condition is not broken unless demand is made by the debenture holder at that place¹; but if the condition is only that the principal shall be paid at a named place, demand of the interest need not be made at such place.² So if the consent of a majority of the debenture holders is required by the deed before an action is brought, a debenture holder who has not obtained such consent cannot obtain the appointment of a receiver.³

The provisions of the trust deed usually give ample powers to the trustees to take possession and sell, and these may be acted upon; but the charge given by a debenture does not (unless express words to that effect are used) empower the holders to sell the property included. If default is made, a sale can only be had by an Order of the Court.⁴

Where the debentures or trust deed do not give express powers of sale, or where the amount of the debentures is large, it is usual for one debenture holder on behalf of himself and all the other debenture holders to apply to the Court by what is commonly called "a debenture holders' action" for the appointment of a receiver and manager and a sale of the assets under the direction of the Court. If the default upon which the debentures become enforceable has occurred, the order for the appointment of a receiver is almost a matter of course and is followed in due time by an order for sale. Matters relating to receivers and managers are dealt with on page 256, *infra*.

One debenture holder may apply on behalf of himself and all the others, and orders made in such an action bind the whole class, but the plaintiff himself has not authority to make any agreement binding the others in regard to the subject-matter of the action.⁵ The necessary parties to the action include the company, the trustees (if any) of the trust deed securing the debentures, and any other mortgagees known to the plaintiff,⁶ such as the holders of second and third debentures, or some person appointed to represent them.

¹ *Thorn v. City Rice Mills*, [1889] 40 Ch. D. 357; *re Escalera Silver Co.*, [1908] 25 T. L. R. 87.

² *Sumner v. Harris Calculating Machine Co.*, [1914] 1 Ch. 920.

³ *Pethybridge v. Umbelton Co.*, [1918] W. N. 278.

⁴ *Blaker v. Herts and Essex Waterworks*, [1889] 41 Ch. D. 309; adopted by the Court of Appeal in *Marshall v. South Staffordshire Tramways*, [1895] 2 Ch. at page 53; and even the Court will not order a sale in the case of a public undertaking. See cases cited in this note and *Gardiner v. London, Chatham, and Dover Railway Co.*, [1867] 2 Ch. 201.

⁵ *Securities Investment Co. v. Brighton Alhambra*, [1893] 62 L. J. Ch. 516; *re Calgary and Medicine Hat Co.*, [1908] 2 Ch. at page 659.

⁶ *Wilcox & Co.*, [1903] W. N. 64.

Prima facie a debenture holder has not any right to apply to restrain the performance of an *ultra vires* act, for such an action must be brought by the company or a shareholder,¹ but there may be cases where such an action would lie by a debenture holder, *e.g.* if the act complained of amounts to a dissipation of the security; but even in this case a debenture stock holder who has no charge on the property would not be entitled to sue.²

An English debenture holder cannot prevent creditors from enforcing their rights in a foreign country under the *lex loci* except by himself taking proceedings there. Even when a receiver has been appointed in the country it is not a contempt for an unsecured creditor to enforce his remedies abroad.³

When judgment has been given notice is given to all the debenture holders by letter, and in case of bearer debentures by advertisement (directions of Chancery Judges, May, 1896), and thereupon any debenture holder can if he so desires apply by summons for leave to attend the proceedings, but at his own risk as to costs. It is irregular for a debenture holder to enter an appearance without leave.⁴ Before judgment any debenture holder who is not satisfied that the plaintiff should represent him can apply by summons to be added as a defendant, and the order is usually made as of course, but with the proviso that he shall attend only at his own risk as to costs.

A plaintiff debenture holder may discontinue the action at pleasure, even after judgment if he has no notice of other claims (*e.g.* if he is the only debenture holder), the rule in such case differing from that in a creditor's administration action⁵; but the plaintiff cannot compromise or give away the rights of the class,⁶ and where a foreclosure order *nisi* is made, or an order for accounts and inquiries, the company, as mortgagor, can insist that it shall be proceeded with.⁶ The Court, however, when it has appointed a receiver, has control of the realisation of the assets, and may direct him to commence or continue proceedings at the expense of the assets, notwithstanding the opposition of the plaintiff, even though he be the only debenture holder.⁷

The plaintiff should ask for—(1) a declaration of the debenture holders' charge; (2) an inquiry what debentures have been issued;

¹ *W. Mate & Sons, Limited*, [1920] 1 Ch. 551.

² *Lawrence v. West Somerset Mineral Railway*, [1918] 2 Ch. 250.

³ *Maudslay v. Maudslay, Sons & Field*, [1900] 1 Ch. 602.

⁴ *Re Alpha Co.*, [1903] 1 Ch. 203.

⁵ *Re Gulguy and Medicine Hat Co.*, [1908] 2 Ch. at page 659; *Smith v. Law Guarantee Society*, [1904] 1 Ch. 500 and 2 Ch. 569.

⁶ *Stevens v. Theatres, Limited*, [1903] 1 Ch. 857; *Taylor v. Mostyn*, [1884] 25 Ch. D. 48.

⁷ *Viola v. Anglo-American Cold Storage Co.*, [1912] 2 Ch. 305.

(3) an inquiry what property is comprised in the charge; (4) an account of the amount due for principal and interest; (5) foreclosure or sale; (6) a receiver and, if necessary, a manager of the business.¹ If there are several sets of debentures or other incumbrances these inquiries must be further elaborated to include them. Where there is a trust deed the writ should ask for a declaration of charge and that it may be enforced, and that the trusts of the deed may be carried into execution.

The Court can make an order for sale on a motion for judgment in default of defence or on admission in the pleadings; but unless all subsequent chargees are parties the order will be for sale with the approbation of the Judge, and absent persons interested will be given notice to attend in chambers.² The Court usually refuses to order a sale before the inquiries have been answered, so that the Court may know the material facts, but there is power to order a sale at any time (see R. S. C., Order XL., Rule 1b). In an ordinary action a motion for judgment must not be made without pleadings unless the company appears and consents.³ The application to the Court by debenture holders to enforce their security may be made by originating summons,⁴ or where the company is in liquidation a debenture holder may, instead of proceeding by action, take out a summons to have a declaration of his charge made and his security realised.⁵

The powers of sale conferred upon trustees by a trust deed securing the debentures are not abrogated by an order of the Court directing a sale, but they can only be exercised subject to the Court's sanction and approval. Thus, where the trust deed authorises a sale for shares or securities of another company and the Court has directed a sale, the trustees or the receiver may still negotiate a sale for shares or debentures and make an agreement to carry it into effect conditional upon the approval of the Court being obtained.⁶

As to the practice in a debenture holders' action and hearing as a short cause see the cases cited in note.⁷

¹ As to filing notice of appointment of a receiver see page 265, *infra*.

² *Stewart v. Craggstone Coal Co.*, [1906] 1 Ch. 523.

³ *Higgs v. Kitson's Empire Lighting Co.*, [1910] W. N. 154.

⁴ *General South American Co.*, [1876] 2 Ch. D. 337, *Oldrey v. Union Works*, [1895] W. N. 77, 72 L. T. 627.

⁵ *Colonial Trusts Corporation*, [1880] 15 Ch. D. 465.

⁶ *Buenos Ayres Port and City Tramways, Limited*, [1920] 123 L. T. 748, 87 L. J. Ch. 597.

⁷ *Parkinson v. Wainwright*, [1895] 64 L. J. 493, 72 L. T. 485; *Brinsley v. Lynton Hotel*, [1895] 2 Mans. 244, *Warwick v. Thurlow*, [1895] 1 Ch. 776; *Cumming v. Metcalfe's London Hydro*, [1895] 2 Mans. 418. Minutes of the order must be prepared and left for the Judge (*re Automatic Machines, Limited*, [1902] W. N. 236).

No sale can be ordered of a statutory company's undertaking if of a public nature,¹ and a sale of such a property, even with the sanction of the Court, is a nullity.²

When a sale has been made, the order of application of the proceeds is as follows:—(1) costs of realisation of the security,³ including the costs of any abortive attempt to sell; (2) costs, expenses, and remuneration of receiver; (3) all costs, charges, and expenses properly incurred by the trustees for the debenture holders⁴; (4) costs of the plaintiff in the action to enforce the security; (5) principal and interest due to the debenture holders⁵; (6) the balance to the company, unless there are second charges, in which case they will rank in like order, but only after the first debenture holders have been paid in full.⁶ *Prima facie* the principal and interest due to each debenture holder is aggregated and dividends paid upon the total amount, but if the assets are not sufficient to pay the principal and interest in full it may be to the advantage of the debenture holders to have payments attributed to capital rather than interest so as to escape income tax, and the Court will accede to an application so to apply the funds.⁷

The trustees will be allowed their full costs in priority to the claims of the debenture holders, although appearing by the same solicitor as the company; but the company will not be allowed as against the debenture holders any separate costs,⁸ and where the action is by or on behalf of holders of first mortgage debentures the holders of second or third mortgage debentures who are made defendants will not be allowed any costs unless there is a surplus after satisfying the claims of the first mortgage debenture holders.⁹

¹ *Gardiner v. London, Chatham, and Dover Railway Co.*, [1866] 2 Ch. 201, *Crystal Palace Co.*, [1911] 27 T. L. R. 413, *Saunders v. Bevan*, [1912] 107 L. T. 70.

² *Re Working Urban District Council (Basingstoke Canal) Act*, 1911, [1911] 1 Ch. 300.

³ This does not include costs of preserving the security (*Lathom v. Greenwich Ferry Co.*, [1895] 72 L. T. 790).

⁴ The solicitors to the trustees, if they have a lien on the title deeds, will thereby get payment for costs incurred before the debenture holders' action was commenced, ranking next after the costs of realisation i.e. before even the receiver is paid.

⁵ If there are any preferential payments to be made under Sections 107 or 200 these take precedence over the payments to debenture holders. If a debenture holder has incurred any costs in establishing his debt, these are added to his debt (*Teechurst Water Co.*, [1915] 139 L. T. J. 295).

⁶ See *Batten v. Wedgwood Coal Co.*, [1884] 23 Ch. D. 317, *London United Breweries, Limited*, [1907] 2 Ch. 511.

⁷ *Smith v. Law Guarantee & Trust Society*, [1904] 2 Ch. 560, *Pigeon v. Calgary Land Co.*, [1908] 2 Ch. 652.

⁸ *Mortgage Insurance Corporation v. Canadian Agricultural Co.*, [1901] 2 Ch. 377.

⁹ *Re Clayton Engineering Co.*, [1904] W. N. 28, 90 L. T. 283.

The plaintiff in a debenture holders' action is allowed his costs as between party and party only,¹ unless the estate is insufficient for payment of the debentures in full, when he is entitled to costs as between solicitor and client.² Even if it finally appear that the plaintiff will take nothing by reason of others being entitled in priority he gets his costs, as the action has realised the fund for the persons interested.³

Each debenture holder has to establish his debt and it is a settled rule that the costs of so doing must be added to the debt, and if the assets are not sufficient to make payment in full only a dividend will be received on such costs⁴; but there is a practice, which has the sanction of the Court, that the solicitor of the plaintiff in a debenture holder's action, when giving notice of the judgment, should invite the debenture holders to send their debentures to him for production in court and undertake to return them. In this case the costs of receiving, acknowledging, and returning the debentures and producing them in court is allowed as part of the plaintiff's costs, and the debenture holder is not liable. This rule applies whether the assets are or are not sufficient to pay the moneys secured in full and whether there is or is not a trust deed.⁵

The liquidator as such gets no costs or remuneration unless there are assets remaining for the company⁶; but if he has acted for the debenture holders in realising the mortgaged assets, or has been appointed receiver for them, his costs of the realisation, or his expenses and remuneration as receiver, are payable out of the mortgaged property.⁷

The proper form of Judgment is given in [1899] W. N. 229, as varied by [1900] W. N. 58.

Subject to the right of persons entitled to preferential payment under Sections 107 and 209 (see page 605, *infra*), the moneys collected are applicable, after payment of costs and expenses, in payment of capital and interest rateably among the debenture holders, persons holding debentures to secure a smaller sum than the face value ranking equally with other debenture holders until

¹ *Re Queen's Hotel Co., Cardiff*, [1900] 1 Ch. 792. Although the plaintiff only gets party and party costs, his solicitor may, if the plaintiff is unable to pay him, get a charging order for the excess of solicitor and client costs for proceedings to recover or preserve assets for the benefit of the debenture holders and company (*re W. C. Horne & Sons*, [1906] 1 Ch. 271).

² *Smith v. Lubbock*, [1901] 2 Ch. 357.

³ *Currick v. Wigan Tramways*, [1893] W. N. 98.

⁴ *Titchhurst Water Co.*, [1915] 139 L. T. J. 295.

⁵ *W. Mute & Sons, Limited*, [1920] 1 Ch. 551.

⁶ *Lathom v. Greenwich Ferry*, [1895] 72 L. T. 790.

⁷ *Ex parte Grassell*, [1876] 3 Ch. D. at page 427. *Ormerod Grierson & Co.*, [1890] W. N. 217.

they have received payment of the full sum due to them, after which they receive nothing further,¹ and if some debenture holders have been overpaid they may be ordered to refund,² and where interest has been paid to a later date on some debentures than on others the amount of principal and interest due to each debenture holder must be aggregated, to ascertain the amount upon which he is to receive a dividend; but when the dividend is received the debenture holders can allocate it to principal or interest at their own choice.³

Debenture holders who have received but not cashed cheques for interest are entitled to rank as secured creditors for such interest, even though their forbearance in not cashing the cheques was deliberate and for the purpose of obliging the company.⁴

Where payments are made from time to time they should be allocated in the order above mentioned; but the terms of interim orders directing the payments are not conclusive, and the moneys may be subsequently allocated in the manner most beneficial to the debenture holders⁵: *e.g.* in payment of principal, so as to avoid the income tax which would attach to payments of interest.

There is a general principle that where a man owes to an estate or fund being administered a sum of money he cannot recover any portion of the estate or fund without first making his own contribution to it which is required to complete it.⁶ Accordingly, a debenture holder who owes money to the company is not entitled to a dividend on his debentures until he has paid what he owes,⁷ and persons to whom he has transferred debentures after the appointment of the receiver cannot claim payment till his debt is satisfied, the amounts due being retained even though there is sufficient to pay all the debentures in full and the amount claimed against the debenture holder is in dispute.⁸ But if the company's

¹ *Regent's Canal Ironworks Co.*, [1876] 3 Ch. D. 43; *W. Tasker & Sons*, [1905] 2 Ch. 587.

² *Platt v. Casey's Drogheda Brewery*, [1912] 1 Ir. R. 279.

³ *Re Midland Express, Limited*, [1914] 1 Ch. 41.

⁴ *Eichholtz v. J. Detries & Sons*, [1909] 2 Ch. 423.

⁵ *Smith v. Law Guarantee and Trust Society*, [1904] 2 Ch. 569; *Pigeon v. Calgary Land Co.*, [1908] 2 Ch. 652.

⁶ *Cherry v. Boulton*, [1839] 4 My. & Cr. 442; *Re Akerman*, [1891] 3 Ch. 212, 219.

⁷ *Farmer v. Goy & Co.*, [1900] 2 Ch. 153.

⁸ *Purtridge v. Rhodesia Goldfields*, [1910] 1 Ch. 239. In this case there was no clause that transferees took free from equities. See also *re Brown and Gregory, Limited*, [1904] 1 Ch. 627, [1904] 2 Ch. 448, where the assignee was trustee for the creditors of the debenture holder. A similar case arises in a winding up (*National Live Stock Co. v. National General Insurance Co.*, [1917] 1 Ch. 628).

claim is against a member of a firm solely, amounts payable on debentures held by the firm cannot be retained to meet the partner's debt.¹

If a company seeks to make a debtor to itself bankrupt and he acquires debentures of the company there will be a set-off, but this will be destroyed if another creditor obtains a receiver of the debtor's interest in the debenture.²

There is a special case where money has been subscribed on debentures for the execution of particular works and the performance of the object has become impossible: *e.g.* where the intention was to construct a railway and either by the forfeiture of the concession or the inadequacy of the funds at the disposal of the company it has become impossible to carry out the work. In such a case the Court may direct that any moneys remaining in hand shall be distributed among the debenture holders without waiting for drawings or other preliminaries; giving effect, however, to any priorities which have already arisen: *e.g.* by bonds having been drawn for repayment and allowing the use of any money which may be required to minimise the loss.³ Such a compromise will not be made binding on persons dissenting from it, who will be left to their charge upon the uncompleted railway and their proportion of the fund; but a reasonable time will be given to persons to come in, and those who do not will be deemed to have dissented and rely upon their charge on the railway.⁴

A debenture holder may, when his principal or interest is in arrear, petition for the winding up of the company.⁵

If the company is wound up by the Court while a debenture holder's action is pending the action will be transferred automatically to the Judges exercising the winding-up jurisdiction, and the proceedings are dealt with by the Registrar in Companies Winding Up.

Receivers and Managers.

Receivers may be appointed either (a) by the debenture holders or trustees as the case may be, or (b) by the Court. In the former case, however, the appointment can only be made if express power is found in the debentures or trust deed, or the power contained in The Conveyancing and Law of Property Act, 1881, is incorporated. The Court, on the other hand, has jurisdiction wherever there is a mortgage or charge.

¹ See *re Kent County Gas Company*, [1913] 1 Ch. 92—a case of distribution of assets in a winding up.

² *Ex parte Peak Hill Goldfields*, [1909] 1 K. B. 430.

³ *Collingham v. Sloper*, [1893] 2 Ch. 90; *Wilson v. Crouch*, [1879] 13 Ch. D. 1, 5 App. Ca. 176.

⁴ *Collingham v. Sloper*, [1894] 3 Ch. 716, *Saragossa Railway v. Collingham*, [1904] App. Ca. 157.

⁵ *Borough of Portsmouth &c. Tramways Co.*, [1892] 2 Ch. 362.

The Court can therefore, at the instance of a mortgagee or debenture holder, appoint a receiver, and where any business is included in the charge a manager, for the protection of the property or security,¹ and may, in respect of a floating charge, grant an injunction restraining the company from parting with the whole of its assets (*e.g.* on a reconstruction) without providing for the amount of the debentures.² The Court, moreover, has power to appoint a receiver even where the debenture holders under the power in their debentures have appointed their own receiver, and if justice requires it, *e.g.* for the protection of a minority, will appoint its own officer to realise the security under the control of the Court.³

When the property charged is in danger of being lost or diminished in value, the debenture holders should apply for the appointment of a receiver, and, if they have a charge on the business or "the undertaking of the company," or "the undertaking and property," or "all the estate, property, and effects," for a manager. The action for a receiver may be commenced before there is any default, and if default occurs before the hearing the appointment may be made.⁴ A receiver may also be appointed even before the principal or interest is in arrear, if the assets are in danger⁵ or a sale will be necessary in the near future.⁶ Many appointments have been made under this power, which is usually referred to as "the power in cases of jeopardy,"⁷ but if any opposition is offered the Court scans closely the circumstances, and will not allow a debenture holder to obtain a receiver merely because the security he has accepted is a risky one or the assets of the company are not sufficient to pay the debentures in full.⁸ A receiver will, however, be appointed if the company's business is practically at an end, and the only asset remaining is a reserve fund created out of profits earned at an earlier date,⁹

¹ *Boyle v. Bettws Llantant Colliery Co.*, [1876] 2 Ch. D. 727; *Peck v. Trimsaran Coal, Iron, and Steel Co.*, [1876] 2 Ch. D. 115.

² *Re Hornsby Co.*, [1890] 2 Ch. 130. This decision was reversed on appeal on the special ground that the sale was authorised by the Memorandum (1901, 1 Ch. 326), but the general principle is not affected.

³ *Hoare v. Slogger Automatic Co.*, [1915] 1 Ch. 478.

⁴ *Caughalton Park Estate, Limited*, [1908] 2 Ch. 62.

⁵ *McMahon v. North Kent Iron Works Co.*, [1891] 2 Ch. 148; *Edwards v. Standard Rolling Stock Syndicate*, [1893] 1 Ch. 574; *Thorn v. Nine Reefs*, [1892] 87 L. T. 93; *Wissner v. Levison & Steiner*, [1900] W. N. 152; *London Pressed Hinge Co.*, [1905] 1 Ch. 576; *Braunstein and Marjolaine, Limited*, [1914] W. N. 335, 112 L. T. 25.

⁶ *Smith v. Wilkinson*, [1897] 1 Ch. 156.

⁷ The jeopardy is usually the danger of the assets charged being taken in execution by unsecured creditors under judgments. The right of the debenture holders thus to make their security attach was discussed by Buckley, J., in *London Pressed Hinge Co.*, [1906] 1 Ch. 576.

⁸ *Re New York Taxicab Co.*, [1913] 1 Ch. 1.

⁹ *Tilt Cove Copper Co.*, [1913] 2 Ch. 588.

or if the business is about to be shut down and the premises let.¹ Indeed, it now seems that the jeopardy must be from some act which would be wrongful as against the debenture holder, or amounts to a destruction of his security.

If there is a specific charge on part of the assets and a floating charge on the rest, jeopardy, by reason of threatened executions on the specifically charged assets, will be a ground for the appointment of a receiver of them, without a receiver and manager of other assets not in jeopardy, the security being ample.²

A manager is appointed by the Court only where the charge includes the business of the company,³ but a general charge on the "property" includes its business, so as to authorise the appointment of a manager.⁴ If the charge is only upon the land (*e.g.* an hotel building) no manager of the business there carried on will be appointed, although a receiver of the rents may be.⁵

The Court will only appoint a manager with a view to an immediate sale, as it will not undertake the permanent management of any concern, and it is usual to direct that the manager shall not act for more than a fixed time (generally three months) without the leave of the Court. If he continues to act after this period his remuneration will be disallowed.⁶ A manager will not be appointed where a sale cannot be ordered: *e.g.* in the case of a public undertaking, such as a railway, tramway, or water company.⁷

As regards foreign estates, some Judges will only appoint a receiver of the rents, profits, and income, and if there are none, and there is not evidence that a receiver can usefully be appointed, may refuse the appointment of a receiver altogether.⁸ The mere order of the Court does not put the receiver in possession of the foreign assets, and until his title is made valid under the law of the country where the assets are situate creditors perfecting their claim under that law will get priority, and it is not a contempt of the English Court for them to get possession of the foreign assets in this manner.⁹

¹ *Braunstein and Marjoline, Limited*, [1914] W. N. 335, 112 L. T. 25.

² *Gregson v. George Tamplin & Co.*, [1915] 112 L. T. 985.

³ *Makins v. Percy Hbbotson & Co.*, [1891] 1 Ch. 133.

⁴ *Salter v. Lens Hotel Co.*, [1902] 1 Ch. 332.

⁵ *Whitley v. Challis*, [1892] 1 Ch. 64.

⁶ *Trenchard v. Wood Green Steam Laundry*, [1918] 1 Ch. 423.

⁷ *Blaker v. Herts and Essex Waterworks*, [1889] 41 Ch. D. 406, *Gardner v. London, Chatham, and Dover Railway*, [1867] 2 Ch. 201, 212, *Marshall v. South Staffordshire Tramways Co.*, [1895] 2 Ch. 36.

⁸ *Mercantile Investment Co. v. River Plate Trust*, [1892] 2 Ch. 303.

⁹ *Maudslay v. Maudslay, Sons & Field*, [1900] 1 Ch. 602.

In a debenture holder's action the Court always requires an affidavit of the fitness of the person proposed as receiver, and if a misleading affidavit is made will revoke the appointment.¹ The receiver is also required to give security and is not allowed to act until the security is completed, although in cases of urgency the Court will allow him to act at once upon the plaintiff (if a responsible person) becoming answerable for his receipts. If there is a dispute as to who shall be appointed receiver the Judge usually refers it to chambers to make the appointment.

A charge on the uncalled capital does not enable the receiver in a debenture holder's action, or the Court at his request, to make a call in the winding up; but the Court will direct the liquidator to make the call, and give the receiver authority to enforce it²; or the uncalled capital may be foreclosed.³ The Court will not usually appoint any person other than the receiver to get in the unpaid capital, even at the request of the debenture holders,⁴ but may for this purpose appoint the liquidator to be receiver.⁵

After the commencement of a winding up the Court has said it is proper to appoint the official receiver, when liquidator, to be also receiver for the debenture holders⁶; but the original receiver would be continued if there were likely to be no surplus for the unsecured creditors, or if special circumstances required it,⁷ or if he were appointed by the debenture holders themselves under powers contained in their deeds,⁸ and recently some Judges have expressed a strong objection to the same person being liquidator and receiver where such person was not the official receiver, there having been cases where the interests of the unsecured creditors and shareholders have been sacrificed.

When a receiver has been appointed by the Court it is a contempt of Court to interfere with his possession without the leave of the Court, and any persons having rights against the property must apply for such leave before exercising or attempting to exercise them, and any person having ground for complaint against a receiver for his conduct in the receivership must apply in the debenture holders' action, and not sue in another court.⁹

¹ *Victoria House Printing Co. v. Church Press*, [1917] W. N. 39, 116 L. T. 247.

² *Fowler v. Broad's Patent Night Lights Co.*, [1893] 1 Ch. 724. *Westminster Syndicate*, [1908] 99 L. T. 924. ³ *Sadler v. Worley*, [1894] 2 Ch. 170.

⁴ *Westminster Syndicate*, [1908] 99 L. T. 924.

⁵ *Bartlett v. Northumberland Avenue Hotel*, [1895] 53 L. T. 611.

⁶ *Re Joshua Stabbs, Limited*, [1891] 1 Ch. 475.

⁷ *British Lamin Co. v. South American Co.*, [1894] 1 Ch. 108.

⁸ *Re Pound, Son & Hutchinson*, [1889] 42 Ch. D. 402.

⁹ *Blair v. Mudstone Palace of Varieties*, [1909] 2 Ch. 283, *Maudslay v. Maudslay, Sons & Field*, [1900] 1 Ch. 602.

If, when a receiver has been appointed, any application to the Court becomes necessary it should be made by the person who has appointed or procured the appointment of the receiver (usually the plaintiff in the debenture holders' action).¹ The receiver is not a party to the action and has no *locus standi*.

The effect of an appointment by the Court of a receiver has been fully discussed in the House of Lords, and the following propositions have been established:—After such an appointment the company continues to exist, but the appointment of the receiver “entirely supersedes the company in the conduct of its business, deprives it of all power to enter into contracts in relation to that business, or to sell, pledge, or otherwise dispose of the property put into the possession or under the control of the receiver and manager. Its powers in these respects are entirely in abeyance”; from which it follows that a contract made in the name of the company but expressed to be “by A. B., receiver and manager,” is not the contract of the company, but that of the receiver.²

After the appointment by the Court the receiver is “the agent neither of the debenture holders, whose credit he cannot pledge, nor of the company, which cannot control him. He is an officer of the Court, put in to discharge certain duties prescribed by the order appointing him.”³ “He is not the agent of the company, but the officer of the Court. His powers are those of such an officer, not those of the company or of an agent or manager appointed by them,”⁴ and, inasmuch as he is not agent either of the debenture holders or the company, he can make no contracts upon which they either can sue or be sued.⁵ He pledges his own credit and is personally liable on the contracts which he makes.⁶ He is an officer of the Court, directed by the Court to carry on the business in the ordinary way until such time as the Court may otherwise direct. “An obligation is placed on him of making the contracts which may be necessary for so carrying on the business, and annexed to that obligation to be indemnified out of the assets of the company in respect of the liabilities he might thereby incur. If he were to make contracts not necessary for the carrying on of the business, as, for instance” (in the case of a brewery), “if he were to

¹ *Windschuegl v. Irish Polishes, Limited*, [1914] 1 I. R. 33.

² *Moss Steamship Co., Limited, v. Whinney*, [1912] App. Ca. 254. The receiver has no power to give unsecured creditors a lien in respect of existing debts so as to take precedence of the debentures even as part of a new contract of freight (same case).

³ *Parsons v. Sovereign Bank of Canada*, [1913] App. Ca. 160, 167.

⁴ *Per* Lord Atkinson, *Moss Steamship Co. v. Whinney*, [1912] App. Ca. 266.

⁵ *Per* Lord Mersey, [1912] App. Ca. 271.

⁶ *Burt v. Bull*, [1895] 1 Q. B. 276.

buy an excessive quantity of malt . . . so as to cripple the business, he would be personally liable on the contracts, and when he came to pass his accounts the Court might refuse him any indemnity out of the assets in respect of the liabilities he had thereby incurred, and might also condemn him in damages. . . . He would have to take the risk of making a mistake in that connection."¹

The appointment of a receiver by the Court does not determine trade contracts,² though the receiver may, with the sanction of the Court, refuse to carry them out, when the other party will only have his remedy in damages against the company (see page 547, *infra*); but the Court will not sanction a wholesale repudiation of contracts merely to obtain better prices, at any rate as long as it is not shown that there is no possibility of the general creditors receiving anything.³ On the other hand it will not direct the performance of a contract from which no profit can arise merely for the benefit of the other contracting party.⁴ The receiver should not, without authority from the Court, by breaking contracts destroy the goodwill of the company,³ but if a contract is one which does not affect the goodwill of the company the Court will give leave to the receiver to disregard it, for he is not bound morally or otherwise by the company's contracts.⁵

The receiver may carry out the existing contracts of the company, and in such a case does not become personally liable on these contracts, for the contracts are those of the company, and the other contracting party can set off any claims he has against the company arising out of the contract against the moneys payable to the receiver.⁶

Where a receiver has incurred liability in carrying on the business of the company he is entitled to be indemnified out of the assets of the company, and to receive from the same source his proper remuneration. This right is well established,⁷ but where he is appointed by the Court it is limited to the assets of the estate he is managing, and he has no claim against the

¹ *Per* Lord Mersey, *Moss Steamship Co. v. Whinney*, [1912] App. Ca. 271.

² *Parsons v. Sovereign Bank of Canada*, [1913] App. Ca. 100. Usually, however, the appointment will put an end to contracts of personal service (*Reid v. Explosives Co.*, [1887] 19 Q. B. D. 261).

³ *Newdigate Colliery Co.*, [1912] 1 Ch. 408.

⁴ *Thames Ironworks Co.*, [1912] W. N. 66, 106 L. T. 674.

⁵ *Beeson v. Great Cobar Co.*, [1915] 1 Ch. 682.

⁶ *Forster v. Nixon's Navigation Co.*, [1907] 23 Times L. R. 138; *Parsons v. Sovereign Bank of Canada*, [1913] App. Ca., in which case there was no liquidation.

⁷ *Strapp v. Bull & Sons*, [1895] 2 Ch. 1; *Batten v. Wedgwood Coal Co.*, [1885] 28 Ch. D. 317; *Glasgow Copper Co.*, [1906] 1 Ch. 365; *British Power Traction Co.*, [1906] 1 Ch. 497; from which cases it appears that his remuneration takes precedence over the plaintiff's costs of action.

company or the debenture holders personally,¹ and any expenses unnecessarily or improperly incurred will be disallowed.²

Where a receiver had carried on business and became himself bankrupt the moneys in court were ordered to be applied, first in payment of the costs of realisation, secondly in payment of the receiver's costs; but the latter were not paid out to the trustee in bankruptcy, the Court seeing that they were applied in paying debts properly incurred in carrying on the business.³

In some cases the receiver will be authorised by the Court to borrow money and to charge the repayment in priority to the debentures⁴; and such a power may be exercised by reborrowing after the original loan is paid off.⁵ When such loans are made to the receiver the expenses of the receivership and of managing the business, including the receiver's remuneration, as well as the plaintiff's costs in the action, take priority over the loans.⁶ The receiver will not be liable personally for loans made in pursuance of leave given to him by the Court to borrow moneys unless he has taken that liability upon himself by the terms of the loan.⁷ The fact that a receiver has obtained liberty to borrow up to a fixed sum does not disentitle him to incur expenses beyond that amount, and to claim repayment of them in priority to the debentures, if they are such expenses as he might have incurred without the leave of the Court.⁸ But this right to indemnity extends only to expenses justifiably incurred, which he had reasonable grounds for believing he would be able to pay, and not to expenses incurred by way of speculation, even though with the object of increasing the value of the business.⁹ Where having power to borrow up to £300 a receiver ordered goods to a greater amount on the understanding that he was not to be personally liable it was held that the creditor who had supplied the goods could not recover on a summons taken out in the debenture holder's action.¹⁰

The effect of a borrowing by a receiver who is not appointed by the Court is considered below.

¹ *Boehm v. Goodall*, [1911] 1 Ch. 155.

² *Per Lord Mersey*, *Moss Steamship Co. v. Whitney*, [1912] App. Ch. 271; *Halifax Joint Stock Bank v. British Power Traction Co. No. 2*, [1907] 1 Ch. 528.

³ *Smith v. London United Breweries*, [1907] 2 Ch. 511.

⁴ *Greenwood v. Algeciras Railway*, [1894] 2 Ch. 205, *Lathom v. Greenwich Ferry Co.*, [1895] W. N. 77, 72 L. T. 790, 2 Mans. 408.

⁵ *Milward v. Avill*, [1907] 4 Mans. 403, [1897] W. N. 162.

⁶ *Glasdir Copper Mines*, [1906] 1 Ch. 365, *Strupp v. Bull & Sons*, [1895] 2 Ch. 1; *Hoffmann v. A. Boynton, Limited*, [1910] 1 Ch. 519.

⁷ *Hoffmann v. A. Boynton, Limited*, [1910] 1 Ch. 519.

⁸ *British Power Traction and Lighting Co.*, [1906] 1 Ch. 497.

⁹ *Halifax Joint Stock Bank v. British Power Traction Co. No. 2*, [1907] 1 Ch.

¹⁰ *Briebe v. Ernest Hawkins & Co.*, [1915] 31 T. L. R. 247.

The foregoing paragraphs deal with the position of a receiver appointed by the Court. A receiver appointed by debenture holders or their trustees is in a very different position: their power to appoint a receiver, or receiver and manager, will depend upon the terms of the instrument containing their security. The power may either be express or may be by reference to The Conveyancing Act, 1881; but, as the latter is very meagre, being primarily intended only to deal with real estate, the express power is usually considerably elaborated. The power must be exercised in strict accordance with its terms, and only if the specified occasion has arisen. The debenture holders cannot therefore rely upon the property being "in jeopardy" unless that is one of the specific causes for which their power is given. If the power is conferred on one or some only of the debenture holders it must be exercised as a trust for the benefit of all the holders of debentures: otherwise the Court will intervene and itself appoint a receiver.¹ For the purpose of ascertaining the status of a receiver appointed by the debenture holders or trustees the debentures and trust deed must be consulted to find out whether there are words declaring him to be the agent of the company or incorporating the provision of The Conveyancing Act, 1881, to that effect. If these words are found, then, the receiver being appointed under the power declaring him to be agent for the company, his dealings will be governed by the ordinary principles relating to the acts of an agent, the company being his principal² until liquidation, when it ceases to hold that position.³ But he does not become the agent of the trustees for the debenture holders who appointed him, nor are they liable for the debts incurred by him upon the company going into liquidation unless they do some act authorising him to pledge their credit.³ If there are no words declaring the receiver to be agent of the company the debenture holders who appoint him are his principals and are liable for his faults or omissions, as well as upon the contracts he makes on their behalf, and to indemnify him against any liabilities he incurs as their agent, and to pay him his remuneration.⁴

¹ *Stuart v. Maskelyne Typewriter &c. Co.*, [1898] 1 Ch. 133.

² *Owen v. Cronk*, [1895] 1 Q. B. 265; *Bissell v. Ariel Motors*, [1910] 27 T. L. R. 76; *Gaskell v. Gosling*, [1897] App. Ca. 575.

³ *Gaskell v. Gosling*, [1897] App. Ca. 575. *Jefferys v. Dixon*, [1866] 1 Ch. 190. *Cox v. Hickman*, [1860] 8 H. L. C. 208.

⁴ *Deyes v. Wood and Others*, [1911] 1 K. B. 806; *Vimbos, Limited*, [1900] 1 Ch. 470. Since the decision in *Deyes v. Wood* a common form of debenture theretofore in use has been altered by the addition of the following words:—"and the holder of this debenture shall not in making or consenting to such appointment (i.e. of a receiver) incur any liability to the receiver for his remuneration or otherwise." These additional words protect the debenture holder not only from liability to the receiver, but also from liability for debts incurred in the course of the carrying on by the receiver of the company's business (*Cully v. Parsons*, [1923] 2 Ch. 512).

If appointed under powers in the debentures authorising him to carry on the business, but not declaring him to be agent of the company, he may even pledge the personal credit of the debenture holders,¹ and he does not pledge his own credit, for his position is governed by the ordinary laws of agency, so that as long as he discloses that he is contracting as agent the contract is that of his principal. Where the receiver appointed by the debenture holders is empowered to borrow for carrying on the business he can create a charge for securing repayment which will rank in priority to the debentures.¹

Where a receiver is appointed in such circumstances as to be agent of the company, and the company subsequently goes into compulsory liquidation, the receiver's right to represent the company ceases. If he continues to carry on the business without obtaining a fresh authority from the debenture holders he is in danger of being personally liable on the ground of having either contracted personally or having warranted that he had authority to contract for someone else.²

Even when the words declaring the receiver to be the agent of the company are omitted he is agent of the company "to such an extent as may be necessary to enable him to exercise the powers conferred on him by the debenture."³

If a receiver and manager properly incurs expenses in carrying on business, he is entitled to be repaid out of the property in priority to the rights of the persons for whose benefit he acted, and his remuneration takes precedence over even the plaintiff's costs of the action wherein he was appointed,⁴ and in cases where being appointed by the debenture holders he is not declared to be the agent of the company he may sue the debenture holders who appointed him for his remuneration.⁵ The receiver of a lease, whether appointed by the Court or the debenture holders only, stands in the shoes of the debenture holders or their trustees, and if they are not assignees of the lease, and therefore not personally liable for the rent, the receiver cannot be compelled to pay rent to the landlord,⁶ and even where

¹ *Robinson Printing Co. v. Chic, Limited*, [1905] 2 Ch. 123.

² *Gaskell v. Goshing*, [1807] App. Ch. 575. It appears from this case that a company in compulsory liquidation cannot appoint or authorise others to appoint a receiver to be the company's agent. It is submitted that in a voluntary winding up the same result follows from the statutory powers given to the liquidator to carry on the business. See Sections 161 and 186 of the Act of 1908.

³ *Per Warrington, J.*, *Robinson Printing Co. v. Chic, Limited*, [1905] 2 Ch. 123, approved by *Vaughan Williams, L. J.*, in *Deyes v. Wood*, [1911] 1 K. B. at page 821.

⁴ *Strapp v. Bull & Sons*, [1895] 2 Ch. 1; *Batten v. Wedgwood Coal Co.*, [1885] 28 Ch. D. 317; *Glasgow Copper Co.*, [1906] 1 Ch. 365; *British Power Traction and Lighting Co.*, [1906] 1 Ch. 407.

⁵ *Deyes v. Wood and Others*, [1911] 1 K. B. 806.

⁶ *Hand v. Blow*, [1901] 2 Ch. 721.

he had sold the benefit of the lease an application that he should pay the rent out of the proceeds of sale failed.¹ If the receiver is appointed under an express power which does not state that he is agent of the company he will be agent of the mortgagees, and any claim by the company or its liquidator against him must be made by action and cannot be by summons in the winding up.²

From the foregoing it will be seen that it is very important for those who give credit to receivers to ascertain the mode of their appointment, as the chances of getting payment will vary greatly. If the appointment is by the Court the creditor will have to look to the receiver's personal credit alone, unless the Court has authorised the borrowing or dealing. If the appointment is by the debenture holders but upon the terms that the receiver is the agent of the company, no credit should be given, for the creditor has not the benefit of either the receiver or the debenture holders being personally liable and will have little chance of getting payment from the company.

The receiver must be careful to apply the assets which come to his hands according to the rights of the persons interested. If he disposes of the assets, or allows them to be taken by others, without providing for claims having a right to preferential payment under Section 209, with knowledge of the claims, he will be personally liable to those entitled to the extent to which they are prejudiced.³

Within seven days after the appointment of a receiver or manager the person obtaining the order appointing him, or making the appointment under the powers of any instrument, must give notice of the fact to the Registrar, who, on payment of the prescribed fee, must enter the fact in the Register of Mortgages (Section 94). If default is made, there is a penalty not exceeding five pounds a day (Sub-section 2).

A receiver on his appointment by the Court is required, before he acts, to give security for the amounts he may receive, but if it is important that he should act at once the Court accepts an undertaking from the plaintiff to be answerable for his receipts. If he incurs personal liability he is *prima facie* entitled to indemnity out of the estate, and persons who have given him credit can stand in his shoes to claim the indemnity. If, however, he owes the company or estate money, he cannot enforce his indemnity until he has made good what he owes, and those

¹ *Abbott v. J. W. Abbott & Co.*, [1913] W. N. 281.

² *Re Vimbos, Limited*, [1900] 1 Ch. 470; *Deyes v. Wood and Others*, [1911] 1 K. B. 806.

³ *Woods v. Winskill*, [1913] 2 Ch. 303.

who claim through him are in no better position,¹ nor can they require his sureties to make good his default if, including the amount he is entitled to by way of indemnity, there is a balance in his favour.²

Where a receiver was appointed in a debenture holder's action, but never completed his security and nothing was done for three years, the Court made an order staying all proceedings in the action.³

When a receiver or manager of a company's property or business is appointed by the Court, he is required, under the order appointing him, to carry in and pass his accounts in the same manner as every other receiver; but there have been complaints that where a receiver is appointed by the debenture holders themselves the company and the unsecured creditors are practically without any means of learning what is being or has been done with the assets of the company. Section 95 enacts that every such receiver or manager who has taken possession shall, once in every half-year while he remains in possession, and also on ceasing to act, file with the Registrar an abstract, in the prescribed form, of his receipts and payments during the period to which the abstract relates, and shall also on ceasing to act as receiver or manager file with the Registrar a notice to that effect, which notice is to be entered in the Register of Mortgages or Charges. In case of default the receiver or manager is liable to a fine not exceeding fifty pounds. This provision will enable interested persons to learn how the realisation of the assets is proceeding.

The title deeds to property included in the trust deed usually remain in the custody of the trustees, but, if it be more convenient, the Court may direct that the receiver shall have custody of them, giving the trustees access to them when necessary.⁴

A receiver, whether appointed by the Court or the debenture holders, cannot purchase for himself the mortgaged property without the leave of the Court.⁵

Trust Deeds for Securing Debentures.

Trust deeds have some considerable advantages, and since the declaration by the Court of Appeal and the decision of North, J., that the mortgages and charges of limited companies do not fall

¹ *Re Johnson*, [1880] 15 Ch. D. 555.

² *British Power Traction and Lighting Co. No. 3*, [1910] W. N. 194.

³ *Cornish Tin Sands, Limited*, [1918] W. N. 377.

⁴ *Fisher v. Ind, Coope & Co.*, [1909] 25 Times L. R. 11.

⁵ *Nugent v. Nugent*, [1907] W. N. 169.

within the Bills of Sale Acts,¹ they have increased in number. The effect of such a deed is to vest in the trustees the property mortgaged, and at the same time to provide persons who can act upon an emergency and take steps on behalf of all the debenture holders without delay. It is not found in practice, however, that such trustees are ready to take much responsibility upon themselves, although they usually stipulate for a considerable remuneration. In such a deed there is also more scope than in the conditions printed on a debenture for setting out the terms and provisions of the mortgage and the manner and conditions of its enforcement, and foreign property, patents, ships, &c., can be vested in trustees in a manner more satisfactory than by giving a charge in the debentures.

The deed should contain an express declaration that the trustees' remuneration shall be paid out of the mortgaged property; for a covenant by the company to pay, even if coupled with a power to the trustees to retain their remuneration out of moneys coming into their hands, will not suffice if the property is realised in an action.² If, however, the deed declares that the proceeds of sale by the trustees are to be applied in paying the remuneration first, and then the debenture debt, the remuneration will be payable out of such proceeds, even though by an order in a debenture holders' action they are paid direct into Court.³ The date to which the remuneration is payable will be determined by the terms of the deed, and differences of judicial opinion have arisen as to the right of the trustees to remuneration after the appointment of a receiver.³

On the registration of a series of debentures the trust deed, if there be one, must be produced to the Registrar⁴; but if there be no trust deed, one of the debentures must be produced (Section 93, Sub-section 3). The practice of the Registrar is to decline to

¹ In the *Standard Manufacturing Co.* case (1891, 1 Ch. 627) it was not any for the deed the chattels deeds the Bill of Sale Acts; but the general decision that mortgages of chattels by companies are not within those Acts involves the exclusion of trust deeds also, and North, J., expressly decided the point in *Richards v. Overseers of Kidderminster* (1896, 2 Ch. 212). The provisions of the Act are obviously drawn with a view to these decisions. Phillimore, J., has held that debentures of a foreign company do not require registration as bills of sale (*Clark v. Balm Hall & Co.*, [1908] 1 K. B. 667).

² *Hodgson v. Acleas*, [1902] W. N. 164, 51 W. R. 57.

³ *Re Piccadilly Hotel, Limited*, [1911] 2 Ch. 534. In this case Swinfen Eady, J., held that as the deed provided that remuneration should continue until the property was realised it continued during the realisation by the Court, although the trustees rendered practically no services; but Eve, J., in *re Locke & Smith, Limited* (1914, 1 Ch. 687), where the words were "during the continuance of the security," held that remuneration ceased on appointment of a receiver, because the services practically ceased then. Peterson, J., in *re Anglo-Canadian Lauds, Limited*, [1918] 2 Ch. 287, and in *British Consolidated Oil Corporation*, [1919] 2 Ch. 81, held that the remuneration continued till the security was realised, though no services were rendered.

⁴ *Re Harrogate Estates*, [1903] 1 Ch. 408. See Act of 1908 (Section 93, Sub-section 3).

register a trust deed unless *ad valorem* duty in respect of the entire series has been either impressed on the deed or deposited with the Commissioners of Inland Revenue, or all the debentures are produced duly stamped. The Commissioners must adjudicate the amount payable, and the fact that there are provisions for making any expenditure by the trustees a charge does not constitute the deed a security for money without limit.¹

Where the trust deed does not itself contain a conveyance to the trustees of the property mortgaged, the Commissioners before 1904 required that each deed conveying any part of the property to them should bear an *ad valorem* stamp at the rate of sixpence per hundred pounds on the total amount of the debentures or debenture stock²; and if one property was afterwards substituted for another as part of the security, a like duty was charged upon the conveyance,³ which, in the case of a small transaction, sometimes made the stamp duty exceed the fee simple value of the property in question. But by Section 7 of The Revenue Act, 1903, it is enacted that the whole amount of the duty payable "on a collateral or auxiliary or additional or substituted security, or by way of further assurance," shall not exceed ten shillings.⁴

Where the company makes a fresh issue partly to replace existing debentures and partly to raise new money, the trust deed must be stamped at the rate of two shillings and sixpence per hundred pounds in respect of the whole amount as a new security, and not in part as a substituted security.⁵

A trust deed conveying property to trustees gives them the position of mortgagees and legal owners of the property conveyed, so that, subject to any express provisions of the deed, they can exercise all the powers of owners. Thus, where shares form part of the security and are registered in the names of the trustees, they can exercise the voting power free from control by the company, whether or not there is any interest in arrear or any default.⁶

The trust deed sometimes provides for a sinking fund to redeem the debentures from time to time. If it is intended that this should be cumulative—*i.e.* that the interest on the redeemed

¹ Lord Suffield v. Commissioners of Inland Revenue, [1908] 1 K. B. 865.

² British Oil and Cake Mills v. Commissioners of Inland Revenue, [1903] 1 K. B. 689, where it was held that *each* of sixteen separate deeds required an *ad valorem* stamp at the rate of sixpence per £100 upon £750,000, making a stamp duty of £3000 in all, in addition to the stamp on the trust deed.

³ Gartside's Brookside Brewery v. Commissioners of Inland Revenue, [1900] 82 L. T. 686.

⁴ This is not retrospective (Lord Suffield v. Commissioners of Inland Revenue, [1908] 1 K. B. 865).

⁵ City of London Brewery v. Commissioners of Inland Revenue, [1899] 1 Q. B. 121.

⁶ Siemen Brothers & Co. v. Burns, [1918] 2 Ch. 324.

debentures should be added to the sinking fund—this must be expressly stated, for it will not be inferred.¹ If the sinking fund is to be applied in the redemption of debentures by purchase, the trustee's duty is to use it to the best advantage of all concerned: they are not bound to accept the lowest tenders if by accepting an offer of a larger block for sale they can effect a more beneficial redemption.²

The trust deed usually declares that the principal money shall become payable in certain events, including the event of the company committing any breach of the covenants contained. This does not, however, give each debenture holder a right to assert that the principal is payable because of some trivial default.³

Power is sometimes given to the trustees to settle disputed questions. In such case an exercise of their discretion is valid.⁴

There have recently been several cases determining the manner in which, under the particular terms of a trust deed, the trustees are to deal with compensation money received on the refusal of the renewal of a licence attached to a part of the mortgaged property. Generally, the money received will be treated as money received upon a sale. If the trustees have a power of sale before the security is enforceable, the moneys received must be treated as if they arose on such a sale.⁵ If neither the trustees nor the company have power to deal with the mortgaged assets, the money, it seems, must be paid to the trustees and invested, the company receiving the income.⁶

Trust deeds must be recorded in the company's Register of Mortgages (see page 100, *supra*), and particulars must be filed with the Registrar (see page 276, *infra*).

Section 102 gives every debenture holder the right (on payment of one shilling in case of a printed trust deed, or of sixpence for every hundred words in case the trust deed has not been printed) to have a copy of the trust deed forwarded to him; and the same section gives every debenture or share holder a right to inspect and require copies of the Register of Debenture Holders (see page 101, *supra*, where the penalties for default are set out).

Information as to stamp duties on debentures and fees on registration will be found in Appendix B.

¹ *Morrison v. Chicago and North-West Granaries Co.*, [1898] 1 Ch. 263.

² *National Trust Co. v. Wicher*, [1912] App. Ch. 377.

³ *Melbourne Brewery Co.*, [1901] 1 Ch. 453.

⁴ *Noakes v. Noakes & Co.*, [1907] 1 Ch. 64.

⁵ *Noakes v. Noakes & Co.*, [1907] 1 Ch. 64; *Bentley's Yorkshire Breweries*, [1909] 2 Ch. 609; *Dawson v. Braine's Tadcaster Brewery*, [1907] 2 Ch. 359.

⁶ *Law Guarantee Society v. Mitcham Brewery*, [1906] 2 Ch. 98.

Meetings of Debenture Holders.—Power to Vary Rights.

It has become common in recent years, either in the trust deed or in the conditions on the debentures, to provide for meetings of debenture holders being held, and to give power to a three-fourths majority to vary the terms of the security, or generally to sanction alterations. This indeed only follows the policy of the law in The Joint Stock Companies Arrangement Act, 1870, which by Section 120 of the Consolidation Act is re-enacted and extended to companies not in liquidation. Such provisions are valid,¹ and the minority will be bound by the decision of the majority. But in such cases care must be taken that the provisions of the trust deed or the debentures are strictly complied with. A majority must not *give away* the rights of the whole body,² for there must be circumstances which bring the power into operation: that is to say, if the power is to compromise there must be a dispute, or if the power is a more general one (*e.g.* to make arrangements) there must be mutual concessions. Accordingly, the terms of the power must be carefully considered. "A power to release the mortgaged premises does not include a power to release the company. The power to modify the rights of the debenture holders against the company does not include a power to relinquish all their rights. A power to compromise their rights presupposes some dispute about them or difficulties in enforcing them and does not include a power to exchange their debentures for shares in another company where there is no such dispute or difficulty. A power to compromise does not include a power to make presents."² A power to "compromise" will not authorise every variation, under that power there must be some real dispute or difficulty before the clause can be brought into operation, but for this purpose a difficulty in obtaining payment owing to the special circumstances of the case will justify a modification which seems to improve the position³ when there is such a dispute. This power will suffice to sanction an arrangement giving shares in a new company in exchange for debenture debt stock of the purchasing company exchange for that of the existing company,⁵ or the creation of a mortgage ranking in priority to the debentures.⁶ An authority

¹ *Re Dominion of Canada Co.*, [1896] 55 L. T. 347, *Folitt v. Eddystone Granite Quarries*, [1892] 3 Ch. 75; and compare *Alabama, New Orleans &c. Railway Co.*, [1891] 1 Ch. 213.

² *Mercantile Investment Co. v. International Co. of Mexico*, [1893] 1 Ch. 181, note (see page 189).

³ *Mercantile Investment Co. v. River Plate Loan Co.*, [1894] 1 Ch. 578, *Spenth v. Valley Gold Co.*, [1893] 1 Ch. 477, *Mercantile Investment Co. v. International Co. of Mexico*, [1893] 1 Ch. 484, note, *Walker v. Elmore's German Metal Co.*, [1901] 85 L. T. 707.

⁴ See last preceding note.

⁵ *Thornton v. Hutchinson & Sons*, [1915] 31 T. L. R. 324.

⁶ *Folitt v. Eddystone Granite Quarries*, [1892] 3 Ch. 75.

to effect any "modification" or "arrangement" contained in the clause gives wider powers than if the word "compromise" only is used,¹ and it is no objection where such words are used that the time for redeeming terminable debentures is extended or terminable debentures are made perpetual mainly for the convenience of the company if the debenture holders get some equivalent advantage.² Even where these powers have not been taken, a compromise can, with the sanction of the Court, be effected under Section 120. Such a power will not suffice to authorise the company, with the sanction of a majority of debenture holders, to sell the assets charged by the debentures and redeem such of the debentures as are offered at the lowest price.³

Where debentures are issued to a bank or other lender to secure a smaller sum than the face value of the debentures the holder is entitled in voting at meetings of the debenture holders to as many votes as the face value confers on him.⁴

Debenture holders may vote according to their private interests, even if these conflict with those of the general body, and it is no objection that special advantages are given to one debenture holder or a class if they are given openly.⁵

Time given to the company for paying debentures under such a provision,⁶ or a reconstruction of the company which gives substituted rights,⁷ does not release sureties who have guaranteed the payment by the company, but a compromise or arrangement which expressly releases sureties is within such powers as above if the debenture holders receive other benefits.⁸

If the deed contains no provision for giving notice to the debenture holders, notice by advertisement is sufficient, and will be deemed to have been given on the day of the advertisement appearing.⁹

REGISTRATION OF MORTGAGES AND CHARGES.

The company must keep a Register of Mortgages and Charges, and enter therein particulars of all mortgages "specifically affecting property of the company" (Section 94: see page 100, *supra*).

¹ *Mercantile Investment Co. v. International Co. of Mexico*, [1893] 1 Ch. 484.

² *Northern Assurance Co. v. Farnham United Breweries*, [1912] 2 Ch. 125, *re Joseph Stocks & Co.*, [1912] 2 Ch. 134, note, *Shandon Hydropathic Co.*, [1911] S. C. 1153, *Court of Sess.*

³ *New York Taxicab Co.*, [1913] 1 Ch. 1.

⁴ *Re Kent Collieries*, [1907] 23 Times L. R. 407, 558.

⁵ *Goodfellow v. Nelson Lane*, [1912] W. N. 167, 28 Times L. R. 461.

⁶ *Finlay v. Mexican Investment Co.*, [1897] 1 Q. B. 517; compare *Andrew v. Macklin*, [1866] 6 Best & Smith 201, *Ellis v. Wilmot*, [1874] L. R. 10 Ex. 10.

⁷ *London Chartered Bank of Australia*, [1893] 3 Ch. 540, *Dane v. Mortgage Insurance Co.*, [1894] 1 Q. B. 54.

⁸ *Shaw v. Royce, Limited*, [1911] 1 Ch. 138.

⁹ *Sneath v. Valley Gold Co.*, [1893] 1 Ch. 477.

In addition to keeping such a Register, Section 93¹ requires particulars of certain mortgages and charges created after the 1st July, 1908, by companies registered in England or Ireland to be delivered to the Registrar within twenty-one days after the date of their creation if they come under any of the descriptions mentioned below. The Act of 1900 had similar provisions in regard to mortgages or charges created after the 31st December, 1900, and before the 1st July, 1908, but they were not so extensive as those in the later Acts. Mortgages and charges created during that interval depend for their validity upon whether they were duly registered under the Act of 1900, and its provisions cannot therefore be ignored. The mortgages and charges requiring registration under the Acts of 1907 and 1908 are (those not included in the Act of 1900 being printed in italics)—

1. A mortgage or charge for the purpose of securing any issue of debentures.
2. A mortgage or charge on uncalled share capital of the company.
3. A mortgage or charge created or evidenced by an instrument which if executed by an individual would require registration as a bill of sale.²
4. *A mortgage or charge on any land, wherever situate, or any interest therein.*
5. *A mortgage or charge on any book debts*³ *of the company.*
6. A floating charge⁴ on the undertaking or property of the company.

But as regards the Acts of 1907 and 1908 the deposit of a negotiable instrument securing the payment of any book debt of the company

¹ Section 14 of the Act of 1900 was repealed by Section 10 of the Act of 1907, which took its place, but it still governs charges created before the 1st July, 1908. In considering, therefore, whether a mortgage or charge created before that date is valid reference must be made to the earlier Act. The Act of 1908 re-enacts the provisions of the Act of 1907.

² That is to say, mortgages or charges on "personal chattels," as defined by Section 4 of The Bills of Sale Act, 1878, which include "goods, furniture, and other articles capable of complete transfer by delivery and (when separately assigned or charged) fixtures and growing crops," also trade machinery as defined by Section 5, but not shares or things in action.

³ "Book debts" means "debts arising in a business in which it is the proper and usual course to keep books, and which ought to be entered in such books" and are not "confined to debts which are actually entered in the books" (*per* Esler, M. R., in *Official Receiver v. Tailby*, [1886] 18 Q. B. D. at page 29). As to how a charge may be created on book debts see *Gorringe v. Irwell India Rubber Works*, [1896] 34 Ch. D. 128. Future book debts can be charged (*Tailby v. Official Receiver*, [1888] 13 App. Ca. 523). Where a bill of exchange has actually been entered in the books of the company it is a "book debt" (*Dawson v. Isle*, [1906] 1 Ch. 633).

⁴ As to the meaning of a "floating charge" see page 228 *et seq.*, *supra*, and *Government Stock Investment Co. v. Manila Railway*, [1897] App. Ca. 81; *Tailby v. Official Receiver*, [1886] 13 App. Ca. 523; *Illingworth v. Houldsworth*, [1904] App. Ca. 353.

(e.g. a bill of exchange or promissory note or a debenture) for the purpose of securing an advance is not to be treated as a mortgage or charge on the book debts, and the holding of debentures of another company charging land is not to be deemed an interest in land, so that the charging of such debentures will not fall within the Consolidation Act (Section 93, Sub-section 1, iii and iv.).

Anything which creates a charge in equity or law (being of any of the classes above described) therefore requires registration: that is to say, anything which would create a charge as between individuals will suffice. "When there is a contract for value between the owner of a chose in action and another person which shows that such person is to have the benefit of the chose in action, that constitutes a good charge on the chose in action. The form of words is immaterial so long as they show an intention that he is to have such benefit."¹ Thus the pledge of whisky at the Custom House and the handing over of delivery warrants as security for a debt constitute a charge requiring registration²; but where goods were in a locked room, and the key was given to the creditor with a letter authorising him to remove them, it was held that possession of the goods had passed to the creditor and he could remove them after a liquidation had commenced.³ Equally a purported assignment of so much of a debt "as may be necessary to indemnify the assignees" against an advance is a charge, and requires registration, for the adoption of a form which does not represent the real transaction will not escape the Act,⁴ and "bonus certificates" giving debenture holders additional benefits to be paid out of the sale of lands secured by a trust deed create a charge which is void if not registered.⁵ So an agreement to create a mortgage or issue a mortgage debenture constitutes an equitable charge; but it seems this will

¹ *Gorringe v. Irwell India Rubber Works*, [1886] 34 Ch. D. 128. In *National Provincial and Union Bank of England v. Charnley*, [1924] 1 K. B., at pages 449, 450, Atkin, L. J., expressed his view as follows: "I think there can be no doubt that where in a transaction for value both parties evince an intention that property, existing or future, shall be made available as security for the payment of a debt, and that the creditor shall have a present right to have it made available, there is a charge, even though the present legal right which is contemplated can only be enforced at some future date, and though the creditor gets no legal right of property, either absolute or special, or any legal right to possession, but only gets a right to have the security made available by an Order of the Court. . . . If, on the other hand, the parties do not intend that there should be a present right to have the security made available, but only that there should be a right in the future by agreement, such as a licence, to seize the goods, there will be no charge."

² *Dublin City Distillery v. Doherty*, [1914] App. Ca. 823.

³ *Wrightson v. McArthur and Hutchinsons, Limited*, [1921] 2 K. B. 807.

⁴ *Saunderson & Co. v. Clark*, [1913] 29 T. L. R. 579.

⁵ *Hoare v. British Columbia Association*, [1912] 107 L. T. 602.

only be effective if registered within twenty-one days. Whether, however, the prior agreement is or is not filed, the actual mortgage or debenture must be registered within twenty-one days of its creation, and it will then constitute a valid legal charge,¹ for "the formal instrument supersedes and gives the go-by to the prior agreement."² On the other hand, where there is an effective pledge, *e.g.* of bills of lading to a Bank as security for a loan, and the bills of lading and other shipping documents are handed back by the Bank to the borrowing company for realisation on the terms of the usual "letter of trust" given by the company, undertaking to hold the documents and the goods on the Bank's account and to remit the proceeds as realised, the letter of trust does not require registration. The rights of the Bank in this very common mercantile transaction depend upon the pledge, and the company merely becomes its agent for realisation.³

A holder of a security may, however, fall between two stools. Thus, where a lender had registered an agreement to give him a floating charge, and subsequently obtained within three months of the winding up a debenture containing the agreed charge, it was held that the agreement had become exhausted on the issue of the debenture, and the debenture was invalid so far as the floating charge was concerned because created for a past liability within three months of the winding up.⁴

Where a mortgage of land or any interest therein made by a company is transferred and the company joins in the transfer and is expressed to convey and confirm the property to the transferee the deed of transfer should be registered, for this creates a new charge by the company additional to the charge in the original mortgage. A "Statutory transfer and statutory mortgage combined," made in accordance with Section 27, Subsection 4, and Form C in Part I of the Third Schedule to The Conveyancing Act, 1881, is of this nature and should equally be registered.

The proper means of obtaining a decision of the Court as to whether registration is necessary is by special case.⁵

¹ *Bristol United Breweries v. Abbot*, [1908] 1 Ch. 279.

² *Columbian Fireproofing Co., Limited*, [1910] 2 Ch. 120.

³ *David Allester, in re*, [1922] 2 Ch. 211.

⁴ *Francis v. Gregory Love & Co.*, [1916] 1 Ch. 203. It was further held that the agreement in the case which gave no present charge but merely a right to a floating charge upon the happening of a future contingency which happened within three months of the winding up would not have been effective.

⁵ *Cunard Steamship Co.*, [1908] W. N. 160.

Any mortgage or charge as above specified not registered¹ within twenty-one days after the date of its creation is, "so far as any security on the company's property or undertaking is thereby conferred," void against the liquidator and any creditor of the company,² and this is so even though the creditor is a second mortgagee who had notice of the prior unregistered mortgage.³ It is to be noted that the charge is not avoided as against the company before liquidation or against purchasers from the company, and the section does not invalidate the contract or obligation for repayment of the money thereby secured, which will accordingly, even if not registered, rank in a liquidation as an unsecured debt, and before liquidation the charge will be enforceable against the company by all the remedies of a mortgage, although void against an execution creditor. Section 93, moreover, makes the money secured become immediately payable when the mortgage or charge becomes void. There was no similar provision in the Act of 1900.

If the mortgage or charge comprises property outside the United Kingdom, it is sufficient, under each of the Acts, if a deed purporting to specifically charge such property is registered, notwithstanding that further proceedings (*e.g.* registration in a colony or foreign country) may be necessary to comply with the law of the country in which such property is situate (Section 93, Sub-section 1, ii.). By the Consolidation Act, "in the case of a mortgage or charge *created out of the United Kingdom* comprising solely property situate outside the United Kingdom," a copy verified in the prescribed manner,⁴ delivered to or received by the Registrar, with the proper particulars, within twenty-one days after the date on which the instrument or copy could in due course of post, if dispatched with due diligence, have been received, will be sufficient to comply with the requirements of the Act (Section 93, Sub-section 1, i.) Companies instructing their agents abroad to create mortgages must therefore be careful also to instruct them to forward particulars by the earliest possible post.

¹ Sect. 14 of the Act of 1900 required the mortgage or charge to be "filed." Section 93 of the Consolidation Act requires "the prescribed particulars of the mortgage or charge, together with the instrument (if any) by which the mortgage or charge is created or evidenced," to be "delivered to or received by the Registrar."

² Consolidation Act, Section 93, Sub-section 1. Note that the words "property or undertaking" do not include uncalled capital (*re* Streatham Estates Co., [1897] 1 Ch. 15, *Johnson v. Russian Spratt's Patent*, [1898] 2 Ch. 110). But it can hardly be intended that a charge on the uncalled capital, if not registered, should be valid.

³ *Tacon v. Monolithic Building Co.*, [1915] 1 Ch. 613.

⁴ *I.e.* certified to be a true copy under the seal of the company or under the hand of some person interested therein otherwise than on behalf of the company (Rules of Board of Trade, 26th March, 1919).

It will be observed that a specific charge on freeholds or leaseholds, or a charge on book debts, is not within the Act of 1900, but is within the Acts of 1907 and 1908. A lien created in the ordinary course of business on moveable goods—and also it seems a mortgage of capital called up but still unpaid, unless given to secure debentures—is not within either Act, and does not require registration.

The Registrar is bound to keep a Register of all Mortgages and Charges required to be registered,¹ and, on payment of a fee prescribed by the Board of Trade,² to enter the date of creation, the amount secured, short particulars of the property mortgaged or charged, and the names of the mortgagees or persons entitled to the charge (Section 93, Sub-section 2), and any person may inspect such Register on payment of a fee not exceeding one shilling (Sub-section 8). The Registrar must also keep a chronological index of the mortgages and charges registered under the Act (Section 98).

But where the mortgage or charge is to secure a series of debentures, or a series of debentures containing a charge, without covering deed, is created, another form of registration is allowed. Under the Act of 1900 the particulars required were—The total amount secured by the whole series; the dates of the resolutions creating the security and of the covering deed (if any); a general description of the property charged; and the names of the trustees (if any) for the debenture holders (Section 14, Sub-section 4); and where more than one issue was made of debentures in the same series the company might require the Registrar to enter the date and amount of any particular issue (Sub-section 5).

These provisions have been recast, and the Consolidation Act (Section 93, Sub-section 3) prescribes that—

“Where a series of debentures³ containing or giving by reference to any other instrument any charge to the benefit of which the debenture holders of that series are entitled *pari passu* is created by a company, it shall be sufficient if there are delivered to or received by the Registrar within twenty-one

¹ Although the word “filed” is used in the Act of 1900, it is not necessary under that Act or under the Consolidation Act for either the instrument requiring registration or a copy thereof to be placed on the file at the Registry. To enable registration to be effected each instrument (except in the case of a series of debentures) has to be produced to the Registrar, and “Particulars” of the charge, set out on the prescribed form, have to be filed. The instruments, each marked as “Registered,” are a few days later handed back, accompanied by the Registrar’s certificate of registration.

² For particulars of fees see Appendix B, *infra*.

³ This includes an issue of debenture stock (*Cunard Steamship Co. v. Hopwood*, [1908] 2 Ch. 561).

days after the execution of the deed containing the charge, or, if there is no such deed, after the execution¹ of any debentures of the series, the following particulars:—

- “(a) The total amount secured by the whole series; and
- “(b) The dates of the resolutions authorising the issue of the series and the date of the covering deed (if any) by which the security is created or defined; and
- “(c) A general description of the property charged; and
- “(d) The names of the trustees (if any) for the debenture holders;

together with the deed containing the charge, or, if there is no such deed, one of the debentures of the series, and the Registrar shall, on payment of the prescribed fee,² enter such particulars in the Register:

“Provided that where more than one issue is made of debentures in the series, there shall be sent to the Registrar for entry in the Register particulars of the date and amount of each issue, but an omission to do this shall not affect the validity of the debentures issued.”³

This sub-section is much clearer than the corresponding sub-section of the Act of 1900, which was, however, interpreted by Buckley, J., in much the same sense⁴ (see page 280, *infra*).

The registration of a series of debentures under this sub-section protects all debentures properly issued in the series, and also agreements to issue such debentures without separate registration, even when such agreements are only to be found in documents which were intended to be debentures, but from a technical defect can only be treated as agreements for debentures⁵

Where a trust deed has not been registered and the company sells property already mortgaged and conveys other property

¹ The word “execution” is substituted in the Consolidation Act for “first issue” in the Act of 1907. This may make a considerable difference. It seems the “execution” will be the actual sending by the company, whether the debentures are delivered to the persons entitled or not, and in the case of debentures to bearer will apparently make registration necessary within twenty-one days after sending, even if no one has agreed to take the debentures. Debentures in favour of an individual should never be sealed before the name is filled in; but if that is done there is a doubt whether they would be held to be “executed.”

² See Appendix B, *infra*.

³ This will be a burdensome duty where debentures are issued one by one or in small lots. Under Section 99, Sub-section 1, there is a liability to a penalty, not exceeding fifty pounds a day, on the company and any person knowingly a party to default in sending for registration particulars “of the issues of debentures of a series.”

⁴ *Re Harrogate Estates, Limited*, [1903] 1 Ch. 498.

⁵ *Umney v. Fireproof Doors, Limited*, [1916] 2 Ch. 142.

purchased with the proceeds to the trustees for the debenture holders, there is a new mortgage requiring registration.¹ But if particulars of the debenture issue and the trust deed have been registered under Sub-section 3, and the deed contains a general floating charge, it is not necessary to identify each item, and therefore, where specifically mortgaged property is withdrawn and other property substituted, with or without a further mortgage under the powers of the trust deed, the charge on the substituted property is protected by the original registration²; and if the trustees themselves, without the intervention of the company, sell part of the mortgaged property and reinvest the proceeds in other property which is conveyed direct to them, it is not necessary to register the transaction, although the property thereby comes under the trusts for the debenture holders.³

Section 93, Sub-section 4, further requires that where any underwriting commission has been paid, or any allowance or discount made on the placing or issue of debentures, the amount or rate of such commission, allowance, or discount must be included in the Particulars filed⁴; but the omission to do this will not affect the validity of the debentures issued, and the deposit of debentures to secure a debt of the company is not, for the purposes of this sub-section, an issue of the debentures at a discount.

The Registrar must give a certificate of the registration of any mortgage or charge, stating the amount thereby secured, and the company must cause a copy of the certificate so given to be endorsed on every debenture or certificate of debenture stock issued, the payment of which is secured by the mortgage or charge so registered⁵ (Section 93, Sub-sections 5 and 6). But where the company has issued debentures or certificates of debenture stock, and further charges are created to the benefit of which the holders are entitled, it will not be necessary for the company to endorse on the debentures or debenture stock certificates already issued a certificate of the registration of the charge (Sub-section 6). The certificate of the Registrar is conclusive evidence that the requirements of the Act as to registration have been complied with, even if there is an omission in supplying the necessary particulars, *e.g.* the date of the resolution authorising the issue of the series,⁶ or of some class of property which is to be subject to the charge.⁶ The Court will

¹ *Cornbrook Brewery v. Law Debenture Corporation*, [1904] 1 Ch. 103.

² *Cunard Steamship Co. v. Hopwood*, [1908] 2 Ch. 561.

³ *Bristol United Breweries v. Abbot*, [1908] 1 Ch. 279.

⁴ There was no corresponding provision in the Act of 1900.

⁵ As to the form of certificate see *re Harrogate Estates, Limited*, [1903] 1 Ch. 408.

⁶ *National Provincial and Union Bank of England v. Charnley*, [1924] 1 K B. 431.

refuse to go behind this certificate, and will not inquire whether there has been any irregularity.¹ Thus, where a creditor sent in defective particulars, omitting to state that the instrument conferred a charge over chattels, and the Registrar, by mistake or oversight, omitted to mention that charge in the Register, his certificate was held to be conclusive that the document creating the charge was properly registered.² In the same case it was also decided that the requirement as to stating "the amount thereby secured" is sufficiently complied with by the words "all sums now due or to become due"

The position of a prospective creditor of a company is therefore attended with great disadvantage. He has a right to inspect the Register kept by the Registrar and the Register kept by the company under Section 100, but he is not entitled to place implicit reliance on either. He has no power of inspecting a copy of the mortgage or charge under Section 101, Sub-section (1), unless he is at the time actually a creditor or member. Further, a statement that the amount secured consists of "all sums now due or to become due" leaves him in the dark as to how much the company really owes, and the statement of the total amount of secured debt in the annual summary only relates to the date to which the return is made up. There appears to be no necessity for the secured creditor, after he has once obtained a certificate of registration, to apply to rectify the Register under Section 96, no matter how defective it may be.

It is the duty of the company to effect the registration, and to supply the necessary particulars; but any person interested therein may, if he think fit, himself register the mortgage or charge (Section 93, Sub-section 7). Every person taking a mortgage or charge should protect himself by registering his security if the company has failed to do so. Section 93, Sub-section 7, entitles him to recover from the company any fees he has to pay.

The company must also keep at its registered office a copy of every instrument creating a mortgage or charge requiring registration,³ and allow inspection by members or creditors of the company in like manner as the Register of Mortgages, and subject to the same penalties in case of default; but in the case of

¹ *Re Yolland, Hasson and Burdett*, [1908] 1 Ch. 152; *National Provincial and Union Bank of England v. Charnley*, *supra*.

² *National Provincial and Union Bank of England v. Charnley*, *supra*.

³ Note that this does not include all mortgages made by the company (see page 272, *supra*), but the Register of Mortgages kept by the company will include all containing a specific charge.

a series of uniform debentures it will suffice to keep a copy of one of such debentures (Section 93, Sub-section 9). Debenture holders have, in addition, a right to be supplied with a copy of any trust deed (see pages 102 and 269, *supra*).

Registration of a mortgage or charge under Sub-section 1 in each Act is required to be effected "within twenty-one days after the date of its creation." What is the date of the "creation" of the charge is often a difficult question. It appears to be something different from the date of the "issue" of the debenture, for Sub-section 1 of Section 99 makes it an offence for any person to permit the delivery of a debenture or debenture stock certificate without having endorsed upon it a copy of the certificate of the Registrar that the charge has been registered. Under the Act of 1900, Joyce, J., held that where twenty debentures were authorised and sealed, and ten were issued before the Act came into force and ten after that date, no registration was necessary even of the latter debentures, as the charge had been "created" in regard to all the debentures before the Act operated¹. Where debentures secured by a trust deed dated the 1st January, 1898, were created and issued in that year, but certain of them were paid off and reissued in 1902 and 1905, Neville, J., held that they did not require registration, as the charge conferred on the holders was created upon the execution of the trust deed and not upon the issue of the debentures,² and Sargant, J., has definitely held that the date of the execution of the deed containing the charge is the date of its creation, even though there is no money then owing and the deed is undated.³ There are, however, dicta of Buckley, J., in the case next below mentioned which point to the necessity of there being an effective charge in favour of some person before it can be said any charge is created, and it must not be thought that mere signing and sealing without delivery would create a charge.

Some assistance as to the date for registration will also be found in *re Harrogate Estates, Limited*,⁴ where Buckley, J., discusses Section 14 of the Act of 1900 in several aspects. His judgment contains the following conclusions:—(1) A resolution to issue debentures creates no charge. (2) The period of twenty-one days for debentures not registered as a series under Sub-section 4 of Section 14 of the Act of 1900 runs from the date at which the

¹ *Watson v. Spiral Globe Co.*, [1902] 2 Ch. 209.

² *New London and Suburban Omnibus Co.*, [1908] 1 Ch. 621.

³ *Esberger & Sons v. Capital & Counties Bank*, [1913] 2 Ch. 366.

⁴ [1903] 1 Ch. 408.

charge was created in favour of a person entitled to the benefit of the charge.¹ (3) Sub-section 4 deals with a different matter, and where there is a series of debentures (with or without a covering deed) allows the registration, not of the charge, but of the resolution creating the series and of the covering deed (if any), which may be in respect of future advances and may define rather than create the charge. Such a registration will protect future debentures or debenture stock included in the series, and also specific charges subsequently given on portions of the assets to complete the security² without further registration. (4) Registration of a series under Sub-section 4 may be made at any time, and will protect all debentures of the series subsequently issued, or those issued not more than twenty-one days before registration. (5) The words in the sub-section, "debentures containing any charge," include any "debentures which have the benefit of a charge."

Before the 1st July, 1908, the more usual practice was to register the individual instruments as separate charges under Sub-section 1 of Section 14 of the Act of 1900 instead of the series under Sub-section 4. In cases where debentures of a series were registered separately and a further issue of the same series is now made, the series should be registered within twenty-one days after the issue of the first of the further debentures. The Registrar considers that registration of the series is also necessary when debentures registered separately are renewed by endorsement, even though they may not have matured.

The matters before dealt with are mortgages and charges created after the respective Acts came into operation, but in addition it was provided by Section 12 of the Act of 1907 that within three months after the commencement of that Act (*i.e.* before the 1st October, 1908) every company must send to the Registrar for registration a statement of the total amount outstanding on the 1st July, 1908, of the debts of the company secured by mortgages or charges created before the 1st July, 1908, which under the provisions of the Act would have required registration had they been created after the commencement of the Act, unless already registered under the Act of 1900. Failure to make this return does not invalidate the charges, but the section imposed a penalty not exceeding fifty pounds a day for default. The provision is not re-enacted; but by virtue of Section 38 of

¹ *Quære*, is this consistent with *Watson v. Spiral Globe Co.*, the *New London and Suburban Omnibus Co.*, and *Esheger's Case*, cited above? In *N. Defries & Co.*, [1901] 1 Ch. at page 39, Buckley, J., said "The date at which the money was borrowed may be the date of the creation of the charge, but whether it is or not depends on the circumstances and the bargain between the parties."

² See *Cunard Steamship Co. v. Hopwood*, [1908] 2 Ch. 504, *per* Swinfen Eady, J.

The Interpretation Act, 1889, which holds good in its general application (see Section 286), the penalty can still be enforced in respect of the period prior to the repeal. Under Section 26 the Annual Returns must contain a summary of all such mortgages and charges as well as of those requiring registration.

Where debentures have been issued, but not registered, the company may at any time before liquidation, by arrangement with the holders, cancel the debentures and issue a new series in their place, registering the new issue within twenty-one days¹; and a deliberate issuing of substituted debentures every fourteen days to avoid registration does not invalidate the final debenture if registered within twenty-one days after its issue²; but each substituted debenture requires a stamp.

The Register of Mortgages to be kept by the Registrar may be rectified by supplying any omission or correcting any misstatement,³ or the time for registration may be extended by a Judge of the High Court⁴ on the application⁵ of the company or any person interested⁶, but this will only be allowed if the Judge is "satisfied that the omission to register a mortgage or charge within the time hereinbefore required, or that the omission or misstatement of any particular with respect to any such mortgage or charge, was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief" (Section 96). Where a solicitor had advised that it was not necessary to register, that was held to be "sufficient cause."⁷

¹ *Re N. Davies & Co.*, [1904] 1 Ch. 37.

² *Re Renshaw & Co.*, [1908] W. N. 210.

³ *E.g.*, cancelling a notice of satisfaction of a mortgage entered by mistake (*C. Light & Co.*, [1917] W. N. 77). When once a certificate of registration has been given by the Registrar, it is, apparently, unnecessary for the secured creditor to take any steps to rectify the Register, however defective or even misleading it may be (*National Provincial and Union Bank of England v. Chumley*, [1924] 1 K. B. 431).

⁴ Application may still be made to extend the time for registration, under Section 15 of the Act of 1909, of debentures created before the 1st April, 1909, notwithstanding the repeal of that section (*Herts and Essex Waterworks Co.*, [1909] W. N. 48; *re Lush & Co.*, [1913] W. N. 99) 108 L. T. 450.

⁵ The Act does not state how this application is to be made. It is in practice made both by motion and summons, as in the case of Rectification of the Register of Members, and the summons may be heard in chambers before the Master or the Judge. In *re Harrogate Estates, Limited*, [1903] 1 Ch. 498, the company asked by motion to extend the time for registering, and subsequently amended the motion by asking for Rectification of the Register.

⁶ *Swinfen Eady, J.*, has held that it is not proper to apply for an extension of time as a means of determining whether or not registration is necessary (*Cunard Steamship Co.*, [1908] W. N. 160).

⁷ *S. Abrahams & Sons*, [1902] 1 Ch. 605.

It is usual to make the order in the following form:—

That the time for registering the debentures [or mortgage] referred to in the summons be extended until days after the drawing up of this order, but this order is to be without prejudice to the rights of parties acquired prior to the time when such debentures [or mortgage] shall be actually registered.¹

Where a charge was created but not registered within the specified time, and leave to register in the above form was subsequently given, the charge was held to be postponed to a duly registered mortgage given before such registration to a director who had full knowledge of the earlier charge at the time he advanced his money.²

This form is adopted even after liquidation, in which case the benefit will be small,³ for a winding up, whether compulsory or voluntary, is a proceeding for the benefit of the unsecured creditors, so as to establish their right not to be postponed to the holders of debentures subsequently registered.⁴ But where there is no winding up before the actual registration of the debentures, an order in the above form does not prevent the debentures, when registered, from taking priority over existing unsecured creditors who have not levied execution or taken some effective step to enforce their debts before the registration of the debentures.⁵ Since the decision to the above effect, Buckley, J., has disclaimed its meaning, and suggested the propriety of varying the form of order so as to give better protection to unsecured creditors; but in the case before him he followed the above form.⁶

The penalties for default are heavy. Under Section 99 the company, and any director, manager, or other officer who knowingly and wilfully authorises or permits any default as to registration of a mortgage or charge, is (without prejudice to any other liability) liable on summary conviction to a fine not exceeding one hundred pounds. There is also a like penalty on any person knowingly and wilfully authorising or permitting the issue of any debenture or certificate of debenture stock requiring registration without a copy of the Registrar's certificate of registration being endorsed thereon.

¹ *Re The Mendip Press, Limited*, [1901] 18 Times L. R. 38, *re Joplin Brewery Co.*, [1902] 1 Ch. 79 (Buckley, J.). A more elaborate form is given for the case where there are duly registered debentures in *L. C. Johnson & Co.*, [1902] 2 Ch. 101.

² *Tacon v. Monolithic Building Co.*, [1915] 1 Ch. 613.

³ *Spiral Globe Co.*, [1902] 1 Ch. 396. In *S. Abraham & Sons*, [1902] 1 Ch. 605, the order was refused on the ground that it would be of no value.

⁴ *Anglo-Oriental Carpet Co.*, [1903] 1 Ch. 914.

⁵ *Ehrmann Bros., Limited*, [1906] 2 Ch. 697. *L. C. Johnson & Co.*, [1902] 2 Ch. 101.

⁶ *Cardiff Workmen's Cottage Co.*, [1906] 2 Ch. 627.

It is not yet fully decided whether registration is notice to all the world of the existence of the debentures or charge. It is well established that any person dealing with a company is deemed to have notice of the contents of its Memorandum and Articles of Association (see page 43, *supra*), and this is on the ground that they are registered and open to all the world. It has further been held that where no special resolution has been registered a lender will be deemed to have notice that powers which could only be given by such a resolution do not exist,¹ but this is at most constructive notice, and if the person interested is acting upon a representation made to him by the company it will not prevail.² It is to be noted that the Courts are now very reluctant to extend the doctrine of constructive notice,³ and, further, the distinction exists that everyone dealing with a company knows that its Memorandum and Articles *must* be filed, whereas he has no reason to anticipate that there are debentures which require registration. However, Kekewich and Eve, JJ., have given decisions tending to affirm the proposition that registration is notice to all the world of the existence of the debentures, but not of their contents.⁴ Thus, a bank having notice that there were debentures which required to be registered, or of the existence of debentures ranking in priority to others given to them, is not to be held to have notice of the terms of such debentures, so as to preclude it from making advances on a specific mortgage.⁵ Banks and others holding security for current accounts or floating balances may be gravely affected by notice of subsequent mortgages or charges, as further advances made by them may be postponed while their existing advances are extinguished by sums paid into the current account (see page 242, *supra*).

In regard to policies of life assurance held by a company it is to be noted that under The Policies of Insurance Act, 1887 (31 & 32 Vict. Ch. 144), the assignee of a policy may sue in his own name, but no assignment of a policy of life assurance confers on the assignee a right to sue for the amount secured until a *written* notice of the assignment shall have been given to the assurance company, and a payment *bonâ fide* made by the assurance company before such notice is received is as valid against the assignee as if that Act had not been passed. This may not be a full protection,

¹ *Irvine v. Union Bank of Australia*, [1877] 2 App. Ca. at page 379.

² *London and New York Investment Corporation*, [1895] 2 Ch. at page 871.

³ *London Joint Stock Bank v. Simmons*, [1902] App. Ca. 201; *Manchester Trust v. Furness*, [1895] 2 Q. B. 539.

⁴ *Standard Rotary Machine Co.*, [1906] 95 L. T. 834; *Wilson v. Kellard*, [1910] 2 Ch. 306.

⁵ *Standard Rotary Machine Co.*, [1906] 95 L. T. 829; *Valletort Laundry Co.*, [1903] 2 Ch. 654.

and an insurance company, before paying under a policy held by a limited company, should inspect the Register of Mortgages to see that no specific charge exists thereon: otherwise it may be held to have paid after having notice of the assignment, and to be unable to rely on the doctrine that a debtor may pay his creditor before notice of any assignment.

As to the particulars of mortgages and charges to be comprised in the Annual Returns see page 447, *infra*.

When a registered mortgage or charge is paid or satisfied a Memorandum of Satisfaction in the prescribed form, verified by a statutory declaration by a director and the secretary, should be filed with the Registrar. Registration of the satisfaction of the debt is optional and may be effected at any time, but it is obviously desirable to record the fact that the company's indebtedness has been discharged or reduced. The satisfaction will be recorded by the Registrar on his Register (Section 97). A copy of the Register can be obtained on payment of a search fee of one shilling and the prescribed fee of five shillings (Order of Board of Trade dated 28th December, 1900).

BOOK II.

MANAGEMENT AND CONDUCT OF THE BUSINESS OF THE COMPANY.

CHAPTER I.

MANAGEMENT OF THE COMPANY.

DIRECTORS.

THE control of companies in this country is almost universally placed in the hands of "directors," a name which indicates that their duties are to direct rather than to manage the business of the company, the latter function being performed by the managers or managing directors.

For the purposes of the Acts the expression "director" includes "any person occupying the position of director by whatever name called" (*e.g.* a member of a committee of management), and for the purposes of making returns under Sections 26, 75, and 274 of the principal Act also includes "any person in accordance with whose directions or instructions the directors of a company are accustomed to act" (Companies (Consolidation) Act, 1908, Section 285, Companies (Particulars as to Directors) Act, 1917, Section 3).

The Act does not define the status of directors, nor is it easy to lay down their precise position. In some sense they may be called managing partners, or agents or trustees for the company, and yet they are not, in the full sense, any one of those three things.¹ "Perhaps the nearest analogy to their position would be that of the managing agent of a mercantile house to whom the control of its property and very large power for the management of its business are confided; but there is no analogy that is absolutely perfect. Their position is peculiar because of the very great extent of their powers and the absence of control."¹ "It does not matter what you call them so long as you understand what their true position is, which is that they are really commercial men managing a trading concern for the benefit of themselves and all the other shareholders in it."² "It is a fallacy to say that the relation is that of simple principal and agent.

¹ *Per* Kay, J., in *Faure Electric Accumulator Co.*, [1889] 40 Ch. D. 141 at page 151.

² *Per* Jessel, M. R., in *Forest of Dean Coal Mining Co.*, 10 Ch. D. 451 at page 453.

The person who is managing is managing for himself as well as others. . . . I do not think it true to say that the directors are agents. I think it is more nearly true to say that they are in the position of managing partners, appointed to fill that post by a mutual arrangement between all the shareholders."¹ When they hold shares (as in most cases they are obliged to do) they are, in a sense, partners; but they have not all the powers and liabilities which the managing partners of a firm have, for their powers are strictly limited by any restrictions contained in the Articles of Association, of which all persons dealing with the company are deemed to have notice, and their liabilities, except in the case of misconduct, are restricted to the amount unpaid upon their shares. Moreover, one director has not power to bind the other directors or the company unless specially authorised to do so, as for instance in the case of a managing director.

Again, they have some of the attributes of trustees, at least as regards any assets which come into their hands,² and, unless expressly empowered by the Articles, they cannot enter into contracts with the company, or make any profit out of the company beyond the remuneration to which they are entitled in pursuance of the regulations and the dividends which they receive upon their shares³; and if they misapply the company's property, even by paying it in dividends to the shareholders, they are liable to make the amount good to the company. But directors are not trustees. "To my mind," says James, L. J., "the distinction between a director and a trustee is an essential distinction founded on the very nature of things. A trustee is a man who is the owner of the property and deals with it as a principal, as owner, and as master, subject only to an equitable obligation to account to some persons to whom he stands in the relation of trustee, and who are his *cestuis que trust*. . . . The office of director is that of a paid servant of the company. The director never enters into a contract for himself, but he enters into contracts for his principal, that is for the company of whom he is a director and for whom he is acting. He cannot sue on such contracts nor be sued on them unless he exceeds his authority."⁴ The property of the company is not vested in him, and the company can alone deal with it or take proceedings for its protection.

¹ *Per* Cozens-Hardy, L. J., *Automatic Self-Cleansing Filter Co. v. Cunningham*, [1906] 2 Ch. 34.

² *Forest of Dean Coal Co.*, [1879] 10 Ch. D. 450; *Lands Allotment Co.*, [1894] 1 Ch. 631, 638.

³ *Aberdeen Railway Co. v. Blaikie*, [1870] MacQ. 461; *Imperial Mercantile Credit Association v. Coleman*, [1873] L. R. 6 H. L. 189.

⁴ *Smith v. Anderson*, [1880] 15 Ch. D. at page 275.

Directors are agents of the company,¹ and when they contract they do so on behalf of the company, without taking any liability upon themselves beyond what may result from their being shareholders, unless they act outside their powers. As in the case of agents, they have only power to act within the scope of their authority, which is prescribed by the Memorandum and Articles; and if they exceed their powers, their principal (the company) can ratify their conduct to any extent within its own powers. But their powers are fuller than those usually accorded to agents, and, from the nature of the case, they are subject to but little control by their principal, for the shareholders have not much opportunity of knowing what the directors are doing, and any action they may wish to take must be slow and greatly encumbered by dealing with large numbers of persons. Moreover, to remove a director, or to control the management in the hands of the existing board by giving it orders how to act, a special resolution is generally required,² unless the Articles contain a clause giving the company power thus to control the acts of the directors otherwise than by special resolution.³

The company is bound by contracts made by directors acting within the scope of their authority, even if they are influenced by some improper motive or intention to derive a profit for themselves.⁴ (How far the company is responsible for wrongs done to third parties by their agents if the act, although within the general scope of their authority, is done for the private ends of the agent, is considered later, at page 313 *et seq.*, *infra*.)

Directors are not trustees for the individual shareholders, and in the absence of unfair dealing may buy shares from or sell shares to shareholders without giving information as to matters relating to the prospects of the company known to them, but not known to the shareholders⁵; but if there is any misrepresentation in acquiring shares or options over shares they may be trustees of the profits they make out of the transaction.⁶

To sum up, the directors, subject to the limitations of their authority contained in the company's regulations, are the managing

¹ "It is to be observed that the directors themselves are only agents of the company" (*per* Fry, J., *Cargill v. Bower*, [1878] 10 Ch. D. at page 513).

² *Automatic Self-Cleansing Filter Co. v. Cunningham*, [1906] 2 Ch. 34, *Salmon v. Quin & Axtens*, [1909] App. Ca. 442.

³ *Isle of Wight Railway v. Tahourim*, [1883] 25 Ch. D. 320, decided on The Companies Clauses Act, 1845, which contains such a provision. The usual clause makes the directors subject to such "regulations" as the company may prescribe (see Clause 71 of Table A). These can only be made by special resolution (see cases in preceding note).

⁴ *Hambro v. Burnand*, [1904] 2 K. B. 10; *Bryant v. Quebec Bank*, [1893] App. Ca. 170.

⁵ *Percival v. Wright*, [1902] 2 Ch. 421.

⁶ *Allen v. Hyatt*, [1911] 30 T. L. R. 444.

agents of the company, with rights of their own similar to those of managing partners, having a duty to the company to carry on its ordinary business, and as such they may do whatever is within the scope of such business, excepting those things which the Act or the Articles declare must be done by the company in general meeting.¹

This general power may be restricted by the Memorandum or Articles of Association. If the directors purport to do that which is outside their own powers, but within the powers of the company, the shareholders can ratify and make valid such action; but if the action is outside the powers of the company no acquiescence or ratification by the shareholders will make the act valid. The ratification by the company may be by ordinary resolution; but if it is desired to give the directors power in future to do acts which under the Articles are outside their powers, a special resolution is necessary, for this is equivalent to an alteration of the Articles.² Persons dealing with a company are deemed to have notice of such limitations of the powers of the directors or of the company as are contained in the registered Memorandum and Articles, and accordingly they cannot rely upon their ignorance of these limitations as a ground for enforcing their contracts.³

Directors are not necessarily individual persons, and, if the Articles allow, another company may be appointed sole director.⁴

Directors are "fiduciary donees of their powers," and as such "are bound to exercise them so as not to give themselves an advantage over other shareholders."⁵ They must act for the benefit of the company in every exercise of their duties, such as allotting shares,⁶ making calls,⁷ forfeiting shares,⁸ or approving transfers.⁹ They must not make a secret profit out of their office,¹⁰ and, unless the Articles specifically authorise it, cannot make

¹ It is within the powers of directors to compromise an action in the interests of the company, although the action may be ill-founded (*Yates v. Cyclists' Touring Club*, [1908] 21 Times L. R. 581).

² *Grant v. United Kingdom Switchback Railway*, [1889] 40 Ch. D. at pages 138 and 139; *Irvine v. Union Bank of Australia*, [1877] 2 App. Ca. 306.

³ See *Ashbury Railway Carriage Co. v. Riche*, [1875] L. R. 7 H. L. 653; *Wenlock v. River Dee Co.*, [1885] 10 App. Ca. 354; *Irvine v. Union Bank of Australia*, [1877] 2 App. Ca. 366; *Attorney-General v. Great Eastern Railway Co.*, [1880] 5 App. Ca. 473.

⁴ *Bulawayo Market and Offices Co.*, [1907] 2 Ch. 45.

⁵ *Per Rigby, L. J.*, in *Alexander v. Automatic Telephone Co.*, [1900] 2 Ch. at page 72.

⁶ *Parker v. McKenna*, [1875] 10 Ch. 96; *Madrid Bank v. Kelly*, [1807] 7 Eq. 442.

⁷ *Gilbert's Case*, [1870] 5 Ch. 550.

⁸ *Harris v. North Devon Railway Co.*, [1855] 20 Beav. 384.

⁹ *Bennett's Case*, [1867] 5 De G. M. & G. 284.

¹⁰ See page 311 *et seq.*, *infra*.

contracts with the company either on their own behalf or on behalf of any company or firm in which they are interested as shareholders or directors without the sanction of the company in general meeting.¹ It has been said that even the issue of debentures to themselves as security for money advanced² or the allotment of shares to themselves³ falls within the rule. "A director is precluded from dealing on behalf of the company with himself, and from entering into engagements in which he has a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound by fiduciary duty to protect, and this rule is as applicable to the case of one of several directors as to a managing or sole director,"⁴ and this rule applies to contracts made with companies or firms in which the director has an interest either as shareholder or director, even if he holds the shares in the latter company only as trustee, for the law will not allow an agent or trustee to act where there is a conflict either of duty or interest.⁵ "Where a director of a company has an interest as shareholder in another company or is in a fiduciary position towards and owes a duty to another company which is proposing to enter into engagements with the company of which he is a director, he is in our opinion within the rule. He has a personal interest within this rule and owes a duty which conflicts with his duty to the company of which he is a director. It is immaterial whether this conflicting interest belongs to him beneficially or as trustee for others. He is bound to do as well for his *cestui que trust* as he would do for himself."⁶ Nor does it make any difference that his conflicting interest is trivial. Even a few shillings will suffice.⁶ If a bargain has been made in defiance of this rule the company may either claim the profit made by the director or his firm, or may rescind the contract on restoring the property even after the contract has been completed, for as between persons in a fiduciary position the rule is not the same as in the case of a contract rescinded for innocent misrepresentation.⁵

Modern Articles usually do authorise directors to make contracts in which they are interested personally on disclosing their interest

¹ Transvaal Lands Co. v. New Belgium Land Co., [1914] 2 Ch. 488.

² Cox v. Dublin City Distillery No. 2, [1915] 1 I. R. 315.

³ Neal v. Quinn, [1916] W. N. 223. There must have been many thousands of cases in which directors have allotted shares to themselves without objection being taken.

⁴ North-West Transportation Co. v. Bently, [1887] 12 App. Ca. 589. This is a principle of law, and does not depend on any prohibition being found in the Articles. See also Aberdeen Railway Co. v. Blaikie, [1854] 1 Macq. 461, Bray v. Ford, [1896] App. Ca. at page 61.

⁵ Transvaal Lands Co. v. New Belgium Land Co. in the C. A., [1914] 2 Ch. 488.

⁶ See last note and Todd v. Robinson, [1894] 14 Q. B. D. 739.

to their fellow directors, and such a clause is valid; but the terms of the Article must be strictly complied with,¹ the disclosure must be full and fair,² and must be to directors who are independent, and not to other directors who are equally interested in the contract in question.³ Thus a director may, while a director, purchase property and resell it to the company without accounting for the profit he makes, provided proper disclosure is made of the fact that he is the vendor and that the Articles as to voting are observed.⁴ Directors are usually forbidden to vote as directors on contracts in which they are interested; and when so forbidden they must not be reckoned in estimating whether a quorum of directors is present.⁵ It will not avail, when two or more directors are interested, to split up the resolution and for each director to abstain from voting on the part in which he is interested.⁶ Such a prohibition, however, will not prevent them from voting as shareholders at general meetings of the company upon contracts in which they are interested,⁷ but an appropriation to themselves of property or valuable contracts sanctioned by their votes at a general meeting will not be valid.⁸

In the absence of an Article authorising a director to contract with the company, such a contract cannot be made even by the votes of the directors not interested, for the company has a right to the unbiased opinion of the whole board.⁹

It has been held that the appointment of a director as chairman of the board, or as managing director, *without an increase of salary* is not "a contract in which the director is interested," but is rather a delegation of powers to him.¹⁰

¹ Where the Articles require that the director's interest must be entered in the minutes, this must be done within a reasonable time, and if not recorded till a year after the resolution it will be invalid (*Tomis v. Cinema Trust Co.*, [1915] W. N. 20).

² *Costa Rica Railway Co. v. Forwood*, [1900] 1 Ch. 756, [1901] 1 Ch. 746; *Imperial Mercantile Credit Association v. Coleman*, [1871] L. R. 6 Ch. 558, [1873] 6 H. L. 189; *Great Luxembourg Railway Co. v. Magnay*, [1858] 25 Benv. 586.

³ *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392; *Gluckstein v. Barnes*, [1900] App. Ca. 240, *Erlanger v. New Sombrero Phosphate Co.*, [1870] 3 App. Ca. 1218.

⁴ *Burland v. Earle*, [1902] App. Ca. at page 93.

⁵ *Yull v. Grey-mouth-Point Elizabeth Railway*, [1901] 1 Ch. 32, *North Eastern Insurance Co.*, [1919] 1 Ch. 198.

⁶ *North Eastern Insurance Co.*, [1919] 1 Ch. 198.

⁷ *North-West Transportation Co. v. Beatty*, [1887] 12 App. Ca. 589; *Burland v. Earle*, [1902] A. C. at page 94.

⁸ *Cook v. Deeks*, [1916] App. Ca. 554.

⁹ *Benson v. Henthorn*, [1842] 1 Y. & C. C. at pages 341 and 342, *Imperial Mercantile Credit Association v. Coleman*, [1871] 6 Ch. at page 567, *Albion Steel Wire Co. v. Martin*, [1875] 1 Ch. D. 580.

¹⁰ *Foster v. Foster*, [1916] 1 Ch. 532.

A bargain by a director with the manager that if the latter shall receive a bonus from the company the director is to participate in it is illegal and cannot be enforced.¹

The directors are not entitled to travelling expenses unless the payment is expressly authorised by the Articles or by the company in general meeting,² even though they be entitled to be indemnified against all expenses.³

Appointment of Directors.

The Articles usually provide how the directors are to be appointed (see the original Table A, Clauses 52 and 53, and the new Table A, Clause 68), and in practice the first directors are usually either named in the Articles of Association or directed to be appointed by the subscribers to the Memorandum of Association; while the provisions for the appointment of future directors usually declare that casual vacancies⁴ may be filled up by the board of directors, and that a certain proportion of the directors (usually one third) shall retire at each ordinary general meeting and their places be filled either by their re-election or by the appointment of other directors by the company at such general meeting, and, in addition, the company seems to have an inherent power to fill vacancies.⁵ (See the original Table A, Clauses 52 to 64, and the new Table A, Clauses 68, 69, and 78 to 85.) But if there is an express power given to the directors to fill vacancies this will negative any implied power on the part of the company for the same purpose,⁶ and if willing to act only the directors can fill a vacancy. If, however, the board will not act, either purposely or because there are disputes and no decision can be come to (*e.g.* where there are only two directors and one will not attend board meetings), the company's power to fill vacancies arises,⁷ and a like rule applies if the directors having the right to appoint a

¹ *Laughland v. Millar, Laughland & Co.*, [1901] 1 Q. B. 413.

² *Young v. Naval and Military Co-operative Society*, [1905] 1 K. B. 687.

³ *Marmor, Limited, v. Alexander*, [1908] S. C. 78, Court of Sess.

⁴ "Casual vacancies" etc, in the absence of any qualifying words, all vacancies which occur by death, resignation, disqualification, the failure of elected directors to accept office, or for any other reason than retirement by rotation, and the power to fill up such vacancies continues, although a general meeting has been held, if the vacancy has not been filled (*Munster v. Cammell Co.*, [1882] 21 Ch. D. 188). See also, as to what are casual vacancies, *La Compagnie de Mayville v. Whitley*, [1896] 1 Ch. at pages 800 and 810.

⁵ *Munster v. Cammell Co.*, [1882] 21 Ch. D. 188, *Isle of Wight Railway Co. v. Tatham*, [1883] 25 Ch. D. pages 334 and 335. But note that these cases contain only dicta, and Cotton, L. J., limits the power to the case where there are no directors to act in filling the vacancies. Fry, L. J., extends it to cases where the directors fail to act.

⁶ *Blair Open Furnace Co. v. Reigart*, [1913] 108 L. T. 665.

⁷ *Barron v. Potter*, [1914] 1 Ch. 895, *Isle of Wight Railway Co. v. Tatham*, [1883] 25 Ch. D. 320.

managing director are equally divided.¹ When the shareholders alone have the right to appoint, the directors cannot by an agreement with a stranger (*e.g.* another company) give him a power to nominate a director,² but if the Articles authorise the delegation of the power of appointing directors to a third party the Court will recognise a right so delegated,³ although a mere right of nomination will not necessarily amount to an appointment of the directors nominated, and the Court may refuse to grant specific performance of the agreement.⁴ If the appointment of directors requires the confirmation of the company at the next general meeting, the directors cannot by appointing a managing director for a fixed period dispense with this confirmation nor give him a right to damages for breach of contract.⁵ If the company can only appoint persons recommended by the board, this recommendation must be given by a properly constituted board meeting; it is not enough if a majority of the board are present and assent to the appointment.⁶ So if holding a qualification is a condition precedent to appointment, an appointment of an unqualified person is wholly void.⁷

It is often required that notice of the intention to propose directors must be given so many days before "the day of election." In such a case if the meeting is adjourned without any election taking place it is sufficient if the notice is given the specified number of days before the holding of the adjourned meeting.⁸

Eve, J., has held that where a notice stated that certain resolutions would be passed "with such amendments as should be determined upon," including a resolution to appoint three named persons, it was competent for the company to add three other persons by way of amendment.⁹

The Act (Section 72) contains certain provisions relating to the necessary preliminaries to the appointment of a director in the case of public companies, which are as follows:—

No person is capable of being appointed a director by the Articles, nor may he be named in a prospectus or the statement in lieu of prospectus as a director, unless, before the registration of

¹ *Foster v. Foster*, [1916] 1 Ch. 532.

² *James v. Eve*, [1873] L. R. 6 H. L. 335.

³ *British Marine Syndicate v. Alpertons Rubber Co.*, [1915] 2 Ch. 186.

⁴ *Plantations Trust v. Bida (Sumatra) Rubber Lands*, [1916] 85 L. J. Ch. 801, 114 L. T. 676.

⁵ *Bluett v. Stutchbury's, Limited*, [1908] 21 Times L. R. 499.

⁶ *Barber's Case*, [1877] 5 Ch. D. 963.

⁷ *Jenner's Case*, [1878] 7 Ch. D. 132.

⁸ *Cutesby v. Burnett*, [1916] 2 Ch. 325.

⁹ *Betts & Co. v. Macnaghten*, [1910] 1 Ch. 430.

the Articles or the publication of the prospectus or filing of the statement, as the case may be, he has signed¹ and filed with the Registrar a Consent in writing to act, and either signed the Memorandum of Association for sufficient shares to form his qualification (if any), or signed and filed with the Registrar a Contract in writing to take from the company and pay for his qualification shares (if any).” Until the company has been actually incorporated the Registrar accepts a form signed by the directors in which they severally agree to take from the company, and to pay for, their qualification shares. It is presumed that if the directors of a company issuing a prospectus are already qualified, it will suffice to file the Contract under which they took their qualification shares; but the wording of the sub-section is **very** inapt for such a case. In practice the same form of contract is filed as would have been filed if the directors had not been already qualified.

But neither of the above provisions applies—(1) to a private company; or (2) to a prospectus issued by or on behalf of a company after the expiration of one year from the date at which the company is entitled to commence business (Section 72, Sub-section 3).

Upon the application for registration of the Memorandum and Articles of Association of a public company the applicant must deliver to the Registrar a list of the persons who have consented to be directors of the company² (Section 72, Sub-section 2).

The Articles sometimes require that no person not already holding the specified qualification shall be eligible, or are in the form “any qualified person may be appointed.” In such case a purported appointment of an unqualified person has no validity even if he subsequently acquire the necessary shares³; but persons so nominated and acting may become liable as *de facto* directors for any misfeasance.⁴ The words “shall not be eligible,” however, do not hinder a man from being appointed by the Articles, for this is not an election.⁵

The number of directors may be varied indefinitely unless provided for by the Articles, and either a single director or a company⁶ may be appointed if the Articles allow. In practice the number of directors is usually settled by the Articles naming a maximum and a minimum number, which must not be passed.

¹ This may be done either by himself or by an agent “authorised in writing.”

² There is a penalty of fifty pounds if the list contains the name of any person who has not in fact so consented.

³ *Barber's Case*, [1877] 5 Ch. D. 903; *Jenner's Case*, [1878] 7 Ch. D. 132.

⁴ *Coventry and Dixon's Case*, [1880] 14 Ch. D. 660.

⁵ *Stock's Case*, [1865] 4 De G. J. & S. 426; *Forbes' Case*, [1873] 8 Ch. 708.

⁶ *Bulawayo Market and Offices Co.*, [1907] 2 Ch. 458.

If the appointment of the first directors lies with the signatories of the Memorandum of Association, they, under the old Table A and the common forms of Articles, until they make such appointment, themselves act as directors. The new Table A has no similar clause, and a general meeting of the company must be held to do any acts. A majority of the subscribers must act in making the appointment of directors,¹ but the appointment may be made by writing without a meeting.²

If there are no directors, any five members of the company can, under Section 67, convene a general meeting to elect directors.³

Registration and Publication of Names of Directors.

Under Section 26 of the Act of 1908 every company is bound to include in each annual return, of which a copy must be forwarded to the Registrar of Companies, "the names and addresses of the persons who at the date of the return are the directors of the company, or occupy the position of directors by whatever name called," and by Section 3 of The Companies (Particulars as to Directors) Act, 1917, it is required to include in the list "any person in accordance with whose directions or instructions the directors of the company are accustomed to act."

Under Section 75 every company is bound to keep at its registered office a register containing the names and addresses and the occupations of its directors and managers, and from time to time to notify to the Registrar any change among its directors and managers, and in this register are to be included, as in the list under Section 26, the same particulars as to persons in accordance with whose directions or instructions the directors of the company are accustomed to act.

By Section 274 every company incorporated outside the United Kingdom which establishes a place of business within the United Kingdom has, within one month of so doing, to file with the Registrar of Companies a list of directors, and in case of any subsequent alteration in the directors to file a notice of such alteration, and in this list also is to be included, pursuant to the Act of 1917, the name of any person in accordance with whose directions or instructions the directors of the company are accustomed to act.

The Act of 1917 applied to companies the provisions of The Registration of Business Names Act, 1916 (which was passed

¹ As to this see *John Morley Building Co. v. Barras*, [1891] 2 Ch. 396, and *London and Southern Counties Land Co.*, [1886] 31 Ch. D. 223.

² *Great Northern Salt Co.*, [1890] 44 Ch. D. 472.

³ *Brick and Stone Co.*, [1878] W. N. 140.

22nd December, 1916), the purpose of which Act was to obtain disclosure of interests in partnerships which otherwise would remain concealed. As compliance with the provisions of the Act could be avoided by registering as a limited company, The Companies (Particulars as to Directors) Act, 1917, was passed to render necessary disclosure of the same particulars in the case of directors of companies as was required of partners under the earlier Act. In order to obtain disclosure in the case of companies which had been incorporated between the date of the 1917 Act and that of 1916, its provisions were made to operate retrospectively in regard to such companies, and the date 22nd November, 1916, was taken for the commencement of some of its provisions.

The Companies (Particulars as to Directors) Act, 1917, is drawn upon the unfortunate method of making its enactments by reference to the earlier Act, which renders its interpretation in some respects difficult and uncertain; in what follows an attempt is made to state the effect of the two Acts as one. By Section 1 of the Act of 1917, in addition to the particulars in respect of directors required by Sections 26 and 274 of the Act of 1908 (see above) there are to be included such particulars as to directors as would be required to be furnished under The Business Names Act, 1916, if they were partners in a firm, and in like manner the Register of Directors to be kept under Section 75 of the Act of 1908 (see above) and the notification of alterations therein are to contain these particulars.

The particulars thus required in regard to the directors are: The present Christian name (or forename if the director is not a Christian) and surname, any former Christian name or forename or surname, the nationality, and if that nationality is not the nationality of origin, the nationality of origin, the usual residence, and the other business occupation (if any) of each of the directors, and the corporate name and registered or principal office of every corporation which is a director.

Throughout it must be remembered that "director" includes any person in accordance with whose directions or instructions the directors of a company are accustomed to act. So that if a corporation forms a subsidiary company and manages it through its own officials acting as directors, the main corporation will be a director in respect of whom the returns must be made. But if an investor, whether a company or an individual, nominates only one or two directors out of a larger board, the other members of which are independent, it cannot be said that "the directors of the company" are accustomed to act on his directions or instructions. Even in cases where one person or

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company selects all the members of a board it will be a question of fact whether the directors act "in accordance with the directions" of the nominator, or act on their own responsibility, notwithstanding the fact that they owe their selection as directors to a particular person.

By Section 2, Sub-section 1, of the Act of 1917 every company registered between 22nd November, 1916, and 2nd August, 1917, and every foreign company establishing a place of business in the United Kingdom between those dates was required to file the above particulars not later than the 2nd September, 1917, and as regards British companies similar particulars respecting persons who had been, but had ceased to be directors. Every company registered after 2nd August, 1917, is obliged to file the above particulars within one month after registration.

By Section 2, Sub-section 2, the effect of Sections 18 and 19 of The Business Names Act, 1916, is extended, as from the 2nd November, 1917, to companies registered after 22nd November, 1916, and their directors as if those directors were partners in a firm requiring registration. And the same provision applies to Foreign companies which, after 22nd November, 1916, have established or shall establish a place of business in the United Kingdom.

The effect of this provision is that every British company registered after 22nd November, 1916, and every Foreign company establishing a place of business in the United Kingdom after that date must "in all trade catalogues, trade circulars, show cards, and business letters on or in which the business name appears, and which are issued or sent" by the company "to any person in any part of His Majesty's dominions, have mentioned in legible characters . . . the present Christian names (or forenames) or the initials thereof and present surnames, any former Christian names (or forenames) or surnames, and the nationality if not British, and if the nationality is not the nationality of origin, the nationality of origin, of all the directors, or in case of a corporation being a director the corporate name of the director." Again it must be remembered that "director" as above mentioned includes a person under whose directions or instructions the directors of the company are accustomed to act.

The penalties for noncompliance may be very high, as in case of noncompliance with the obligation to file particulars the fine may be £5 for every day during which the default continues, in case of trade catalogues &c. it may be £5 for each offence, and in case of a corporation being guilty of an offence against the Act of 1917 every director, secretary, and officer who

is knowingly a party to the default is liable to a like penalty; or if the offence is against Sections 26 or 75 of the Act of 1908 every director or manager knowingly permitting the default is liable; or if it is against Section 274 of the Act of 1908 every officer or agent is liable.

Directors' Qualification Shares.

The Companies Acts and the old Table A do not require a director to be a shareholder, but the London Stock Exchange Committee insist on this as a condition for a quotation, and the Articles almost always require it. The new Table A, however, fixes only one share as the qualification. A director (unless named in the Articles of Association of a public company or in the prospectus) need not acquire his qualification shares from the company: he may purchase them or receive them from another person.¹ But it is a breach of duty for to accept them as a gift from the promoter of the company, or from any person having contracts with the company,² and if he do so he will be liable to account to the company for the value of the shares. He will also be liable to pay up the amount of his qualification if he accepts and holds the necessary shares in trust for the promoters, giving them blank transfers, for this is to put himself entirely at their mercy and is a misfeasance.³

The provisions of the Act in relation to the obligation of directors to agree to take their qualification shares before the issue of the prospectus or the filing of the statement have been dealt with in preceding pages (see page 293 *et seq.*). Section 73 further requires the directors of all companies whose regulations prescribe a share qualification to acquire their qualification within two months after appointment, or such shorter time as may be fixed by the regulations, and declares that the office of any director not acquiring his qualification within such time, or ceasing to hold it after such time, shall be vacated, and that the disqualified person shall not be capable of re-appointment as director until he has obtained his qualification. But if after a director has acquired his qualification the amount required to qualify is increased, and he fails to acquire the additional amount, he does not thereby vacate office.⁴ If an unqualified person acts as a director after the expiration of the period in question, he is,

¹ Carling's Case, [1876] 1 Ch. D. 115; Brown's Case, [1874] 9 Ch. 102.

² Eden v. Ridsdale's Railway Lamp Co., [1889] 23 Q. B. D. 308; Hay's Case, [1875] 10 Ch. 593; Weston's Case, [1870] 10 Ch. D. 579.

³ London and South-Western Canal, [1911] 1 Ch. 346.

⁴ Molineux v. London, Birmingham and Manchester Co. [1902] 2 K. B. 589.

by Sub-section 3, made liable "to a fine not exceeding five pounds for every day between the expiration" of the period within which he had to acquire his qualification "and the last day on which it is proved that he acted as a director."

If the Articles provide that no person shall be "eligible" as a director, or "qualified to become" a director, unless he hold so many shares, the holding of the necessary shares is a condition precedent to election, and the appointment of a person not already holding such shares will be invalid,¹ and the company cannot ratify the appointment without first altering the Articles.² Under The Companies Clauses Act, 1845, the holding of the proper qualification is also a condition precedent to election.³ The more usual form is "A director's qualification shall be" so many shares. These words do not render the holding a condition precedent to an appointment, for in many cases where they are used the question of whether the director had subsequently become liable is debated,⁴ while if they made a qualification a condition precedent there would be no appointment. The Articles frequently add, "A director may act before acquiring his qualification, but shall acquire the same within" a limited time, generally one or two months. The statutory limit of two months is, however, the utmost that can be allowed.

The duties and liabilities of directors in regard to acquiring their qualification shares vary according to the provisions of the Articles of Association. The original Table A contained no requirement as to qualification; the new Table A provides that "the qualification of a director shall be the holding of at least one share in the company"; and the terms of special Articles have varied greatly. If the form used is that in the new Table A, a contract will be imported on the part of every person accepting the office of director to acquire the number of shares required for his qualification within the time specified, or if no time is specified within a reasonable time, this contract being constituted by the fact of his taking office upon the terms of Articles requiring the holding of a qualification.⁵ But only the bargain as appearing in the Articles is binding on the director, and if they do not prescribe that he shall take his qualification

¹ *Barber's Case*, [1877] 5 Ch. D. 963; *Jenner's Case*, [1878] 7 Ch. D. 132.

² *Boschoek Co. v. Fuke*, [1906] 1 Ch. 148.

³ *Channel Collieries Trust v. Dover Railway Co.*, [1914] 2 Ch. 506.

⁴ *Re Issue Co.*, *Hutchinson's Case*, [1895] 1 Ch. 231; *Brown's Case*, [1874] 9 Ch. 102, where Mellish, J. J., said "according to the ordinary understanding of mankind it would be quite sufficient if a person acquired shares before he acted as a director." But he must acquire them before acting (*Miller's Case*, [1876] 3 Ch. D. at page 635).

⁵ *Ex parte Isaacs*, [1892] 2 Ch. 158, *re Hercynia Copper Co.*, [1891] 2 Ch. 403.

shares from the company he may purchase or obtain them from any person possessed of shares,¹ but he must acquire the shares before acting as a director.²

If the Articles do not authorise a director to act before acquiring his qualification, it is his duty to qualify (A) before he acts as a director,³ and (B) within a reasonable time after his appointment, even though he has not acted meantime³, and he must in any event acquire his qualification within two months after his appointment (Section 73).

If the Articles authorise a director to act before acquiring his qualification, he may purchase or take the necessary shares at any time during the period named in the Articles (not being more than the two months allowed by Section 73), but is under an obligation to qualify within that time, and if he does not do so his office is vacated, and if he continues to act he is liable to penalties.

To ascertain whether a director who has not expressly agreed to take his qualification shares is liable for them it is necessary to see whether there has been an *implied* offer by him to take the shares and an acceptance of that offer by the company. Before the passing of the Act of 1900 it was held that if a director accepted the office of director and continued in office without qualifying after the expiration of the period within which he was bound to acquire his qualification as above mentioned, he was deemed to have made an offer to the company to accept an allotment of so many shares as were necessary to make up his qualification, but if he resigned before the expiration of the period in question no such offer was to be imputed to him.⁴ Acceptance of the office of director may be proved by showing an actual acceptance, or that he acted as a director after being named in the Articles or elected.⁵ It is not enough that he has been held out to the public as a director.⁶ The offer to take shares would be limited to the number of shares required to complete his qualification if he already held any shares otherwise acquired.⁷ But such offer would not make him a member or liable for the

¹ Brown's Case, [1874] 9 Ch. 102, Miller's Case, [1876] 3 Ch. D. 661.

² Per Jessel, M. R., in Miller's Case, [1876] 3 Ch. D. at page 665.

³ *Re Issue Co., Hutchinson's Case*, [1895] 1 Ch. 234, *Molneux v. London, Birmingham, and Manchester Co.*, [1902] 2 K. B. 589, where signing a prospectus issued to the public was held to be acting as a director.

⁴ *Salisbury Jones's Case*, [1894] 3 Ch. 356, *Onslow's Case*, [1898] 57 L. J. Ch. 338.

⁵ *Leake's Case*, [1870] 6 Ch. 460, *Hercynia Copper Co.*, [1894] 2 Ch. 403.

⁶ *Harward's Case*, [1871] 13 Eq. 30; *Marquis of Bute's Case*, [1892] 2 Ch. 100.

⁷ *Duke's Case*, [1875] 1 Ch. D. 620; *Miller's Case*, [1876] 3 Ch. D. 661, 667.

amount of the shares unless it was accepted by the company.¹ The acceptance must be regular and duly communicated to the director, an allotment made without notice to the director being insufficient,² although it seems that if his name is actually placed on the Register of Members while he is a director, that will be treated as being sufficient notice to him.³ If the company goes into liquidation without having duly accepted the director's offer to take shares from the company, it is too late to complete the contract, and neither by giving notice of acceptance after liquidation nor by placing the director's name on the Register of Members can he be made liable.⁴ It must be noted also that if the Articles are in a form that makes a qualification a condition precedent to election (e.g. "no person shall be eligible as a director," or "no person shall be qualified to become a director"), the appointment of an unqualified director being a nullity, he is not to be deemed to have offered to take shares from the company,⁵ and accordingly the company cannot make him liable. And if the company never commenced business, or never went to allotment, the reasonable time within which he might acquire his shares was considered to continue to run.⁶

There have been no decisions upon the effect of Section 3 of the Act of 1900 (which is now re-enacted as Section 73) upon the above rules, but it is submitted that a director who accepts office must, in any case, qualify within two months, whether the company commences business or not; but, inasmuch as if unqualified he vacates office at the expiration of that time, he will not be deemed to have offered to take the requisite shares from the company unless he in some way acts as a director after the period limited for acquiring his qualification.

In addition to the cases stated above, a director will be liable if the Articles contain a clause, now not uncommon, declaring that if a director has not otherwise acquired his qualification within a specified period he shall be deemed to have applied for and been allotted the necessary shares. If these or similar words are found in the Articles, the director becomes liable immediately on the

¹ Totthill's Case, [1865] 1 Ch. 85; *ex parte* Cammell, [1891] 2 Ch. 392. *Wharfedale* Buller Consols, [1888] 38 Ch. D. 12.

² *Ex parte* Cammell, [1891] 2 Ch. 292.

³ Leeke's Case, [1870] 11 Eq. 100, 6 Ch. 469; *Brown's Case*, [1871] 9 Ch. 102; *Miller's Case*, [1876] 3 Ch. D. 661; *Lord Inchuquinn's Case*, [1891] 3 Ch. 28.

⁴ *Re Issue Co.*, *Hutchinson's Case*, [1895] 1 Ch. 226.

⁵ *Hamley's Case*, [1877] 5 Ch. D. 705; *Barber's Case*, [1877] 5 Ch. D. 963; *Jenner's Case*, [1878] 7 Ch. D. 132; *Coventry and Dixon's Case*, [1880] 11 Ch. D. 660; *Wharfedale* Buller Consols, [1888] 38 Ch. D. 45.

⁶ *Hewitt's Case*, [1881] 25 Ch. D. 283; *re Issue Co.*, *Hutchinson's Case*, [1895] 1 Ch. at page 235.

expiration of the period named, whether or not the company makes any allotment or puts his name on the Register, and the liquidator may, after a winding up has commenced, place his name on the list of contributories,¹ and this is so if he has accepted office, even though he has not acted as a director.² He, however, escapes if he resigns within the period allowed for acquiring his qualification.³

Shares held jointly with another person are a sufficient qualification, unless the Articles provide for a sole holding.⁴ Shares held by executors will be a good qualification where the Articles do not contain the words "in his own right."⁵

The Act does not prevent a director from paying for his qualification shares out of the purchase money coming to him from the sale of a property to the company; and, inasmuch as Section 25 of The Companies Act, 1867, is repealed, it seems that a director or any other person may now pay for his shares in money or money's worth,⁶ and not necessarily in cash. It is not payment, however, if fully paid shares which should be allotted to someone else are issued to the subscriber of the Memorandum or contracting party as nominee of that other person,⁷ nor will a merely colourable payment and repayment by the shareholder to the company and the promoter be sufficient.⁸

Although it is highly improper for a director secretly to accept a gift of shares from a promoter, they will suffice to form his qualification⁹; but shares acquired from third parties after the director has become liable to take them from the company, and has been placed upon the Register of Members, will not relieve him from liability to pay to the company for the shares so allotted as his qualification.¹⁰ When a director has accepted his qualification shares he cannot, if he determines to have nothing more to do with the company, surrender them, and he will not be relieved from liability, even though shares having the same numbers are allotted to others, provided the company has sufficient shares unissued to provide the number accepted by the director.¹¹

¹ *Isaac's Case*, [1892] 2 Ch. 158, *Salton v. New Beeston Cycle Co.*, [1899] 1 Ch. 775.

² *Hercynia Copper Co.*, [1894] 2 Ch. 403, *Carling's Case*, [1876] 1 Ch. D. 115.

³ *Salisbury Jones's Case*, [1894] 3 Ch. 356.

⁴ *Dunster's Case, re Glory Paper Mills*, [1894] 3 Ch. 478.

⁵ *Grundy v. Briggs*, [1910] 1 Ch. 444.

⁶ *Dent's Case*, [1873] 8 Ch. 768, 776; *Baglan Hall Colliery Co.*, [1870] 5 Ch. 346, 354.

⁷ *Forbes and Judd's Case*, [1870] 5 Ch. 270; *Fraser's Case*, [1873] 28 L. T. 158, 42 L. J. Ch. 358, *Migotti's Case*, [1897] 4 Eq. 248.

⁸ *Leeke's Case*, [1870] 11 Eq. 100, 6 Ch. 469.

⁹ *Hercynia Copper Co.*, [1894] 2 Ch. 403; *Carling's Case*, [1876] 1 Ch. D. 115.

¹⁰ *Ilfracombe Railway Co. v. Nash*, 22 L. T. 209, *Lord Inchiquin's Case*, [1891] 3 Ch. 28; *Salton v. New Beeston Cycle Co.*, [1899] 1 Ch. 775.

¹¹ *Lord Wallscourt's Case*, [1899] 7 Mans. 235.

A director acting without acquiring his qualifying shares is entitled to the remuneration prescribed by the Articles,¹ at any rate until such period as he ceases to hold office by reason of his want of qualification.²

When the Articles require a director to hold a certain number of shares "in his own right," it appears that this only means that he must not hold them in a representative capacity (e.g. as an executor of a deceased shareholder), and does not prevent shares registered in his name as a trustee or mortgagee from being a sufficient qualification.³ This view, though doubted by a high authority,⁴ is now followed.⁵ The test is that the holder "must be a person who holds in such a way that the company can safely deal with him in respect of his shares, whatever his interest may be in the shares."⁶ Thus, when the company has notice that the holder is bankrupt,⁶ or the company has actually entered in its Register the fact that he is liquidator or executor,⁶ the shares will not form a qualification.

The Articles usually provide that the acts of an unqualified director are valid until the defect is discovered; and Sections 71 and 74 make valid acts of *de facto* directors, as, for instance, the summoning of a meeting of the company,⁷ notwithstanding any defect which may subsequently be discovered; but the penalty (not exceeding five pounds a day) imposed by Section 73, Sub-section 3, cannot be evaded, while the liability under Section 3 of the Act of 1900, which was a sum of five pounds a day, without any power to reduce it, would seem still to apply to defaults before the 1st July, 1908.

Remuneration of Directors.

Directors are not entitled as of right to any remuneration, whether upon a *quantum meruit* or otherwise.⁸ "A director is not a servant; he is a person doing business for the company, but not upon ordinary terms. It is not implied from the mere fact that he is a director that he is to be paid for it"⁹; but the Articles usually declare that directors shall receive remuneration and fix the

¹ *International Cable Co.*, [1892] W. N. 34, *Sutton v. New Beeston Cycle Co.*, [1890] 1 Ch. 775.

² See *Woolf v. East Nigel Co.*, [1905] 21 Times L. R. 660, *re Bodega Co.*, [1904] 1 Ch. 276.

³ *Pulbrook v. Richmond Consolidated Mining Co.*, [1878] 9 Ch. D. 610.

⁴ *Bambridge v. Smith, per Cotton, L. J.*, [1889] 41 Ch. D. 468.

⁵ *Cooper v. Griffin*, [1902] 1 Q. B. 740, *Howard v. Sadler*, [1893] 1 Q. B. 1.

⁶ *Sutton v. English and Colonial Produce Co.*, [1902] 2 Ch. 502. But the fact that the shares will vest in the trustee is no ground for refusing to pass the transfer (same case).

⁷ *Boschoek Co. v. Fuke*, [1906] 1 Ch. 148; *Channell Collieries Trust v. Dover Railway Co.*, [1914] 2 Ch. 506. Compare *British Asbestos Co. v. Boyd*, [1903] 2 Ch. 439.

⁸ *Geo. Newman and Co.*, [1895] 1 Ch. 674; *Dunstan v. Imperial Gas Co.*, [1832] 3 B. & Ad. 125, *ex parte Cannon*, [1885] 1 Ch. D. 626.

⁹ *Per Bowen, L. J.*, in *Hutton v. West Cork Railway*, [1883] 23 Ch. D. at page 671.

amount, in which case when earned it becomes a debt for which the directors can sue.¹ Their right in such case arises from the contract to employ them as directors, and the Articles must be looked at to see what are the terms agreed upon for their remuneration.² If the Articles are silent, the company in general meeting may vote the remuneration; but in such case the remuneration is a gratuity, and not a matter of right.³ So in a going company a general meeting may vote a gratuity beyond the amount prescribed by the Articles,⁴ but upon liquidation this cannot be done.⁵

The question frequently arises whether a director who has served only a portion of a year is entitled to a proportionate amount of the annual sum fixed for directors' remuneration. The answer to this question must depend upon the terms of the agreement or Articles of Association defining the remuneration. The decisions upon the interpretation of the common forms of Articles are not satisfactory. In the first place it has been argued that under Sections 2 and 5 of The Apportionment Act, 1870, directors' remuneration is salary, and as such is to be considered as accruing from day to day and apportionable in respect of time. This view was taken in the Divisional Court in *Morarty v. Regent's Garage Company, Limited*,⁶ but in the same case the Court of Appeal declared that the question must be considered as left open.⁷ Apart from the Apportionment Act it appears to be clear that if the Articles declare that a director is to receive remuneration "at the rate of" so much per annum, he will be entitled to a proportionate sum for a broken period.⁸ If, however, the remuneration of each director is so much per annum, it is not clear whether the amount is apportionable in respect of time. The

¹ *Nell v. Atlanta Co.*, [1804] 11 T. L. R. 407, *ex parte* Beekwith, [1898] 1 Ch. 324, *Dover Colfield Extension Co.*, [1908] 1 Ch. 65.

² *Moheneux v. London, Birmingham, and Manchester Co.*, [1902] 2 K. B. 596.

³ *Geo. Newmann and Co.* [1895] 1 Ch. 374, *Dunstan v. Imperial Gas Co.*, [1892] 3 B. & Ad. 125, *ex parte* Cannon, [1885] 1 Ch. D. 626.

⁴ *Re Lundy Granite Co.*, [1872] 26 L. T. 673.

⁵ *Hinton v. West Cork Railway Co.*, [1883] 23 Ch. D. 654, *Stroud v. Royal Aquarium*, [1903] 89 L. T. 343.

⁶ [1921] 1 K. B. 423.

⁷ [1921] 2 K. B. 766.

⁸ *Per* Younger, L. J., in *Morarty v. Regent's Garage Co.*, [1921] 2 K. B. at page 786, see also *Diamond v. English Sewing Cotton Co.*, [1922] W. N. 237. In this case there was also an Article providing for additional remuneration to the directors contingent upon the amount of dividend declared upon the ordinary shares, such extra remuneration to be divided among the directors in such proportions as they might agree, and in default of agreement equally. A director having resigned before the end of the financial year was held entitled to a rateable proportion of the extra remuneration, there having been no agreement as to its division. In the case of such a claim an action cannot be brought for it until the year has expired (*Morarty v. Regent's Garage Co.*, *supra*, at page 775).

well-known principle of *Cutter v. Powell*¹ is that a servant employed to serve for a specified period for a lump sum is not entitled to anything unless he has served the whole period; but in *Swabey v. Port Darwin Co.*² the Court of Appeal held that as the directors had power to resign and might be removed from office there was an implied right to an apportionment of the remuneration, but this view has not been adopted in two subsequent cases in the Court of Appeal³ and is in conflict with several cases in Courts of first instance⁴ which have the approval of the before-mentioned cases in the Court of Appeal. In the cases which came directly before the Court of Appeal there were other grounds upon which the plaintiff's case failed, and it might be said that they could be distinguished, but in *Moriarty's Case* Lord Sterndale, M R, in interpreting the agreement that the plaintiff should be appointed a director, "and that his fees for so acting shall be one hundred and fifty pounds per annum," says "It is a payment per annum, a payment for a year, and unless he serves for the year he cannot get the payment," and Younger, L.J., expressed a similar opinion⁵. The correct view therefore seems to be that, subject to the question of the Apportionment Act, which is still open, a director's right to remuneration is not apportionable when the words conferring the right give him so much per annum, whether or not he is liable to removal or entitled to resign.

* Even if the Apportionment Act applies the apportioned part of the remuneration is only payable when the entire remuneration would have been due, and an action brought before this date will fail (Apportionment Act, 1870, Section 3). Similarly, even if the remuneration is "at the rate of" so much per annum, but is divisible "in such proportions as the directors shall agree," no claim can be supported until the directors have come to an agreement,⁶ or if the words are "in such proportions as the directors shall agree or in default of agreement equally" the claim can only be established after the year has elapsed, so that there has been a failure to agree.⁷

¹ [1765] 6 T. R. 320, 2 Sm. L. C. page 1.

² [1890] 1 Meg. 385. The report is inaccurate in stating that remuneration was "at the rate of two hundred pounds per annum," see [1901] 1 K. B. 613.

³ *Iuman v. Ackroyd*, [1901] 1 K. B. 613, and *Moriarty v. Regent's Garage Co.*, [1921] 2 K. B. 766.

⁴ *Salton v. New Beeston Co.*, [1899] 1 Ch. 755; *Central de Kaap Gold Mines*, [1899] W. N. 216, 235, 69 L. J. Ch. 18. See also *McConnell's Case*, [1901] 1 Ch. 728.

⁵ *Moriarty v. Regent's Garage Co.*, [1921] 2 K. B. at pages 774 and 781.

⁶ *Morrell v. Oxford Portland Cement Co.*, [1910] 26 Times L. R. 682.

⁷ *Moriarty v. Regent's Garage Co.*, [1921] 2 K. B. at pages 774 and 788.

Liquidation puts an end to the service,¹ but service after the winding up has in one case been allowed to complete the year.² The appointment of a receiver and manager does not determine the directors' right to remuneration.³ If remuneration is payable "at such time as the directors may determine," one of the directors cannot sue for fees until the board have fixed the time for payment.⁴

The remuneration may be either a sum to be divided among the directors, or so much for each director, or it may be by way of a commission upon the profits of the company. Except in the last-named case, or unless it is expressly stated that the fees are only to come out of profits, fees prescribed by the Articles are payable whether the company is earning profits or not, being in fact the reward for management, for which the directors can sue the company.⁵ The most common form is for an amount to be named by the Articles, which the directors may divide among themselves as they shall determine. Until the directors have determined the proportions no director can sue for his fees,⁶ and the continuing directors may determine that a retiring director shall receive no part of the remuneration.⁷ Sometimes, however, a fixed fee is paid for each meeting attended, or the remuneration is proportioned to the number of attendances. An agreement between a company and its directors under which the directors forego fees due to them is binding on each director, even though the company gives no consideration for the agreement; and a company may become party to such an agreement by its liquidator.⁸ A resolution of the directors at a board meeting, while the company is a going concern, to forego or to postpone their fees will also be binding, certainly as to future fees,⁹ and, it is submitted, even in respect of fees already earned. Since a company, while a going concern, acts by its directors, a formal resolution of the board is an act of the company, and, it would seem, necessarily makes the company a party to the agreement of the directors evidenced

¹ *Central de Knap Gold Mines*, [1899] W. N. 216.

² *Shaws, Bryant & Co.*, [1901] W. N. 124.

³ *Dale & Plant*, [1889] 61 L. T. 206, *South Western of Venezuela Railway*, [1902] 1 Ch. 701.

⁴ *Caridad Copper Mining Co. v. Swallow*, [1902] 2 K. B. 44.

⁵ *Re Landy Granite Co.*, [1872] 20 L. T. 673, *Nell v. Atlanta Co.*, [1894] 11 T. L. R. 407.

⁶ *Morrell v. Oxford Portland Cement Co.*, [1910] 26 Times L. R. 682; *Joseph v. Sonora (Mexico) Land Co.*, [1918] 34 T. L. R. 220. In these cases the Article did not contain the words "and in default of agreement equally" (cf. page 304, note ³, *supra*).

⁷ *Gilman v. Gulcher Electric Light and Power Co.*, [1886] 3 Times L. R. 113; *Joseph v. Sonora (Mexico) Land Co.*, [1918] 34 T. L. R. 220.

⁸ *West Yorkshire Durracq Agency v. Coleridge*, [1911] 2 K. B. 326.

⁹ *Milburn v. Chaffers Extended*, *Times*, 3rd June, 1899; *McConnell's claim*, [1901] 1 Ch. 728; *re Consolidated Nickel Mines*, [1914] 1 Ch. 883.

by the resolution.¹ A resolution to take no fees may, however, be rescinded, and as from the rescission will cease to operate.²

If a director's appointment is not validly made he cannot recover remuneration, either under the Articles or under a *quantum meruit*, although he may have served for a long period³; and if it be discovered that fees have been paid for a period after the director had vacated office under the terms of the Articles, the company, in a case where the facts negative the probability of an intention to grant remuneration, can recover the amount paid by mistake.⁴

The remuneration covers travelling expenses, and unless specially authorised by the Articles or by resolution of a general meeting such expenses must not be paid in addition⁵; nor may the directors without such authority pay income tax on their remuneration out of the company's assets: it must come out of the remuneration⁶.

When the remuneration is by a percentage of profits, it does not include a share of the profit made on the sale of the whole business of the company,⁷ but it will include profits which exist in specie, even though not converted into cash until after liquidation.⁸

Directors who are appointed receivers or managers in a debenture holders' action may recover remuneration in both capacities⁹. The sale of the bulk of the company's property so that the directors' duties are greatly reduced does not disentitle them to their full remuneration.¹⁰

It was held by Pearson, J., that when a company is in liquidation the directors' claim for fees must be postponed to the claims of outside creditors, on the ground that the former is made by the directors in the capacity of members¹¹; but more

¹ *Lambert v. Northern Railway of Buenos Ayres*, [1870] 18 W. R. 180, is not a satisfactory authority for the proposition that a resolution to forego or postpone fees already earned is collective (see *McConnell's claim*, [1901] 1 Ch. at page 733).

² *Re Consolidated Nickel Mines, Limited*, [1914] 1 Ch. 883.

Woolf v. East Nigel Gold Mining Co., [1905] 21 T. L. R. 660.

³ *Re Bodega Co.*, [1904] 1 Ch. 276. In this case the director was disqualified for having secretly participated in contracts with the company.

⁴ *Young v. Naval and Military Co-operative Society*, [1905] 1 K. B. 687, *Marmor, Limited*, *v. Alexander*, [1908] S. C. 78.

⁵ *Boschoek Co. v. Fake*, [1906] 1 Ch. 148.

⁶ *Franks v. Bultfontein Mining Co.*, [1891] 1 Ch. 140.

⁷ *Re Spanish Prospecting Co.*, [1911] 1 Ch. 92.

⁸ *South Western of Venezuela Railway*, [1902] 1 Ch. 701; *Rishton v. Gossell*, [1886] 5 Eq. 326.

⁹ *Re Consolidated Nickel Mines, Limited*, [1914] 1 Ch. 883.

¹¹ *Ex parte Cannon*, [1885] 30 Ch. D. 626.

recent decisions have allowed a managing director who was a member of the company,¹ and ordinary directors where the Articles fix their remuneration,² to prove for such remuneration in competition with the outside creditors. But it would seem that if the remuneration were merely a gratuity voted by the company, and not payable under the Articles, it would not be provable.³ Directors who pay themselves in preference to other creditors when the funds are not sufficient to pay all in full,⁴ or who take fees in excess of the proper amount,⁵ can be made to repay the amount. They must not, when the company is insolvent, pay up the calls due on their own shares and immediately use the money for their fees.⁶

It seems the company cannot ratify the payment by directors of remuneration in excess of that allowed by the Articles without first altering the Articles or passing a special resolution,⁷ but it can grant additional sums by way of gratuity payable out of profits or other moneys at the company's disposal, provided this is done at a properly constituted meeting on due notice.⁸

The remuneration paid to directors is the payment for their services, and where a company has provided the qualification shares of directors appointed to represent its interests on the board of another company it has no claim to the fees paid to such directors unless an express bargain has been made that they shall hand over their fees.⁹

The Court refused to appoint a receiver of directors' fees at the instance of a creditor,¹⁰ but there is no reason why a garnishee order should not be made when the fees are due.

Vacating the Office of Director.

Table A, Clause 78, provides that at the first ordinary meeting all the directors shall retire from office, and that at the ordinary meeting in every subsequent year one third of the directors for the time being shall retire, and special Articles almost always have similar Articles for the retirement of a

¹ *Re Dale & Plant*, [1890] 43 Ch. D. 255.

² *Re New British Iron Co., ex parte Beckwith*, [1898] 1 Ch. 324; *re A 1 Biscuit Co.*, [1899] W. N. 115.

³ *A 1 Biscuit Co.*, [1899] W. N. 115; *ex parte Cannon*, [1885] 30 Ch. D. 626.

⁴ *Gaslight Improvement Co. v. Terrell*, [1870] 10 Eq. 168.

⁵ *Re Whitehall Court*, [1887] 56 L. T. 280.

⁶ *Re Washington Diamond Mining Co.*, [1893] 3 Ch. 95.

⁷ *Boschoek Co. v. Fuke*, [1906] 1 Ch. 148.

⁸ *Geo. Newman & Co.*, [1895] 1 Ch. 674.

⁹ *Dover Coalfield Extension Co.*, [1908] 1 Ch. 65.

¹⁰ *Hamilton v. Brogden*, [1891] W. N. 36.

certain proportion of the directors by rotation. Clause 82 of Table A provides that if at any meeting at which an election ought to take place the places of the vacating directors are not filled up the meeting shall be adjourned for a week, and if at the adjourned meeting the vacant places are not filled the vacating directors shall be deemed to have been re-elected. It has been held that the portion of this Article relating to the adjournment is directory only, and "if for any reason either the first meeting or the adjourned meeting at which the election of directors ought to take place does not proceed validly to fill up the places of the vacating directors, then they are to continue in office"¹; but where no meeting is held during the year Sargant, J., has held that the directors who ought to have retired at the meeting for that year cease to be directors as from the 31st December.²

The office of director is usually declared to be vacated if he do or suffer certain things, such as becoming bankrupt or insolvent. But this does not prevent a person who is a bankrupt at the time of his appointment from holding office.³ As to the meaning of "insolvent" see *Sissons & Co. v. Sissons*.⁴ There must be some declaration or admission of insolvency, but not necessarily any bankruptcy.⁵ Mere insolvency in fact (*i.e.* inability to pay debts as they accrue) such as would appear from a strict taking of accounts is not enough, but various facts and admissions showing that the director knows that he cannot meet his liabilities in full constitute evidence on which the Court may find him to be disqualified under such an Article.⁶ Other usual grounds declaring the office of director vacant are being concerned or interested in contracts made with the company,⁷ accepting or holding an office of profit under the company,⁸

¹ *Great Northern Salt and Chemical Works*, [1890] 14 Ch. D. at page 482.

² *Consolidated Nickel Mines, Limited*, [1914] 1 Ch. 883.

³ *Dawson v. African Consolidated Co.*, [1898] 1 Ch. 6.

⁴ [1910] 54 Sol. J. 802.

⁵ *James v. Rockwood Colliery Co.*, [1912] 106 L. T. 128.

⁶ *London & Counties Assets Co. v. Brighton Grand Concert Hall, Limited*, [1915] 2 K. B. 493.

⁷ The fact of holding shares in another company contracting is a sufficient interest to create disqualification (*Turnbull v. West Riding Club*, [1894] 70 L. T. 92; *Todd v. Robinson*, [1884] 14 Q. B. D. 739, *Dunnes v. Grand Junction Water Co.*, [1852] 3 H. L. C. 759). But the Articles usually make such a case an exception (see Table A, Article 77). If the words are "if he is concerned in or participates in the profits of any contract" it is immaterial that there was no profit from the transaction (*Star Steam Laundry Co. v. Dukas*, [1913] W. N. 39, 108 L. T. 367).

⁸ For instance, as paid trustee for debenture holders (*Astley v. New Tivoli*, [1869] 1 Ch. 151). Where the Articles provided that a director who accepts or holds any office under the company should be disqualified, and the secretary was appointed a director, and after such appointment performed the duties of secretary without salary, it was held that there was no disqualification (*Iron Ship Coating Co. v. Blunt*, [1868] L. R. 3 C. P. 484).

failing to acquire the qualification within a stated time,¹ or being absent from meetings of directors for a long period (see the original Table A, Clause 57, and the new Table A, Clause 77). If the words used in the Articles are "if he absent himself," this means "voluntarily," and absence through sickness is not a disqualification.² If the words are "if he is concerned in any contract" the director will be disqualified even though the contract was such that he could make no profit out of it.³

The principle that a director may not be a party to any contract with the company or derive profits from dealing with the company (see page 290, *supra*) does not depend on the Articles. The disqualification usually imposed is in addition to the liability to account for the profits made from the transaction.

Upon the happening of any of the specified events the office is *ipso facto* vacated,⁴ and the other directors cannot waive the disqualification; but if the cause of disqualification is the doing or suffering some act (*e.g.* being declared bankrupt⁵ or accepting a place of profit), the outgoing director may be re-elected. On the other hand, if the cause of disqualification is a continuing one (*e.g.* participating in a contract which requires continued consideration by the board), it will again render the office vacant, even if the offender has been in the meantime re-elected.⁶

By special Articles a director is usually allowed to resign. Even in the absence of such a power, unless the Articles contain conditions, he may resign, and his resignation is complete when notice is given to the secretary, and cannot subsequently be withdrawn,⁷ even though no acceptance has taken place.

Where directors are appointed to fill office for a specified time and continue to act after the expiration of that time, no others being appointed to take their places, their acts will bind the company.⁸

¹ The Act now makes this a statutory disqualification at the expiration of the time named in the Articles of Association, with a maximum of two months (Section 73). This does not apply where the qualification is increased after the director has acquired the original qualification (*Molnoux v. London, Birmingham and Manchester Co.*, [1902] 2 K. B. 559).

² *Mack's Claim*, [1900] W. N. 114; *McConnell's Case*, [1901] 1 Ch. 728.

³ *Star Steam Laundry Co. v. Dukas*, [1913] W. N. 30, 108 L. T. 367.

⁴ *Bodega Co.*, [1901] 1 Ch. 276, which appears inconsistent with *Turnbull v. West Riding Athletic Club*, [1904] 70 L. T. 92, where Kekewich, J., held that a director must be given an opportunity of explaining his conduct. See also *Hunnings v. Williamson*, [1883] 11 Q. B. D. 533.

⁵ *Dawson v. African Consolidated Co.*, [1898] 1 Ch. 6.

⁶ *Bodega Co.*, [1901] 1 Ch. 284. Clause 57 of the original and Clause 77 of the new Table A declare a director's office vacant if he hold any other office or place of profit under the company, or be concerned in the profits of any contract with the company. This is usually varied in special Articles, but it is a most salutary rule.

⁷ *Matland's Case*, 4 De G. M. & G. 769; *Transport, Limited, v. Schomberg*, [1905] 21 Times L. R. 305; *Glossop v. Glossop*, [1907] 2 Ch. 370. Compare *Reg. v. Mayor of Wigan*, [1885] 11 Q. B. D. 908. The decision of Kekewich, J., in *Municipal Freshfield Land Co. v. Pollington*, [1890] 63 L. T. 238, 59 L. J. Ch. 734, cannot now be relied on.

⁸ *Muir v. Forman's Trustees*, [1904] Court of Sess., 5 F. 546.

There is generally a power to remove directors by extraordinary resolution. If this be so, an ordinary resolution will not suffice. If there be no power to remove a director, the Articles must first be altered to give such a power before he can be removed,¹ or the company must wait till he retires by rotation, when it can refuse to re-appoint him. The Court, however, will not necessarily compel a company to employ a director against its will, notwithstanding it may have contracted under seal to do so, but may leave him to his remedy in damages for breach of contract.² But the refusal to allow him to act must be that of the company in general meeting, and not that of the board of directors.³ Where, however, under a contract and the Articles a shareholder had a right to nominate two directors, the Court made a declaration that such a nomination was valid and that the directors were well appointed, and intimated that it would enforce their right to serve unless there was some objection on the ground of unfitness.⁴ A power to remove a director "for negligence or other reasonable cause" was held to mean such cause as the company thought reasonable, and the Court refused to interfere.⁵

Conduct of Business by Directors.

The members of the board when acting by a sufficient quorum (which is usually prescribed by the Articles) need not all be present, and of those present a majority may act. If no quorum be prescribed, a majority of the board is required to form a quorum,⁶ but in some cases it has been held that the number to form a quorum can be established by the practice of the board.⁷ But if there be a clause in the Articles that the continuing directors may act notwithstanding vacancies, a number less than the minimum number of directors allowed by the Articles is capable of binding the company.⁸ The Articles may, however, show that not less than the minimum number is to act, and where the minimum was four, but only two were named in the Articles, it was held that these two were not "continuing" directors, and could not act till a full board was appointed.⁹

¹ *Imperial Hydropathic Hotel Co. v. Hampson*, [1883] 23 Ch. D. 1.

² *Bunbridge v. Smith*, [1889] 41 Ch. D. 402, 476; *Harben v. Phillips*, [1883] 23 Ch. D. 14, 40. The former case related to a managing director, whose position is somewhat different to that of an ordinary director. On this point see the case cited, note 4, *per* Sargant, J., at page 195.

³ *Pullbrook v. Richmond Consolidated Co.*, [1878] 9 Ch. D. 610.

⁴ *British Murex Syndicate v. Alperion Rubber Co.*, [1915] 2 Ch. 180.

⁵ *Enderwick v. Snell*, [1849] 2 Mac. & G. 216.

⁶ *York Tramways Co. v. Willows*, [1874] 8 Q. B. D. 685.

⁷ *Regent's Canal Ironworks*, [1867] W. N. 79; *Lyster's Case*, [1867] 4 Eq. 233.

⁸ *Scottish Petroleum Co.*, [1883] 23 Ch. D. 413.

⁹ *Re Sly, Spink & Co., Hertzel's Case*, [1911] 2 Ch. 430, *per* Neville, J.; but see *La Compagnie de Mayville v. Whitley*, [1890] 1 Ch. 798.

Where the number remaining in office is less than a quorum, it has been doubted whether they can act,¹ but in a case under The Companies Clauses Act, 1845, it was held that a single director could act although the quorum was three,² and the same reasoning would apply under the usual Articles. In reckoning a quorum directors not entitled to vote (e.g. as being interested in the contract under discussion) must not be counted.³ If two directors are, in fact, interested in a transaction the objection will not be removed by splitting up the resolution and each director voting only on the part affecting the other,⁴ and a resolution reducing the quorum for the purpose of enabling those not interested to pass the resolution will be invalid.⁴

Notice of the meeting must be given to all the directors, for business done at a meeting of which some director had no notice is invalid, and a director has no power to waive his right to notice⁵; but if a director is abroad and out of reach of notices, a meeting held without notice to him is valid.⁶ The notice may be a very short one; even a few minutes' will suffice if the director can attend, and where he objects to the shortness of the notice he should make his objection at once, or it will not prevail.⁷ A verbal notice is also sufficient.⁷ It is not necessary that the notice should state what business is to be transacted⁸ unless the Articles require that certain business shall only be transacted at a meeting specially convened for that purpose, in which case the notice must sufficiently indicate the business to be considered.⁹ It has been held by Kekewich, J., that where there were only two directors of a company, and one did not attend a meeting duly summoned, but the other, meeting him shortly after in the passage to his office, proposed the election of a third director, and, on objection being made, declared that by his casting vote as chairman he carried the resolution, his action was valid¹⁰; but where

¹ See *Owen and Ashworth's Claim*, [1900] 2 Ch. 272, and [1901] 1 Ch. 115; *Newhaven Local Board v. Newhaven School Board*, [1885] 30 Ch. D. 351.

² *Channel Collieries Trust v. Dover Co.*, [1914] 1 Ch. 508; affirmed in the C. A., [1914] 2 Ch. 505.

³ *Yull v. Greymouth-Point Elizabeth Railway*, [1904] 1 Ch. 32.

⁴ *North Eastern Insurance Co.*, [1919] 1 Ch. 198.

⁵ *Portuguese Copper Mines*, [1889] 12 Ch. D. 160; *Young v. Ladies Imperial Club, Limited*, [1920] 2 K. B. 523.

⁶ *Halifax Sugar Co.*, [1890] 62 L. T. 564. Compare *Smyth v. Darley*, [1840] 2 H. L. C. 789, stating that all corporators not "beyond summoning distance" must have notice of a meeting of the corporation.

⁷ *Browne v. La Trinidad*, [1887] 37 Ch. D. 1 (see page 9).

⁸ *La Compagnie de Mayville v. Whitley*, [1896] 1 Ch. 788.

⁹ *Young v. Ladies Imperial Club, Limited*, [1920] 2 K. B. 523.

¹⁰ *Smith v. Paringa Mines, Limited*, [1906] 2 Ch. 193.

one director met another at a railway station and proposed resolutions to which the other would not listen, the resolutions were held not well passed.¹

According to the well-established rule that an agent cannot act on behalf of his principal in a matter in which the agent has a conflicting interest or duty, directors are precluded from taking part in any resolution under which they take a benefit or which adopts a contract that concerns them² unless the Articles authorise their doing so. The cases upon this subject are noted on pages 289, 290, and under the headings "Liability of Directors" and "Secret Profits." It must be here noted that if interested directors take part in any transaction there is an irregularity which renders the transaction voidable by the company as against the directors and any persons who have knowledge of the facts. The Articles usually declare that the chairman shall have a casting vote in case of the directors being equally divided upon any question. An appointment of a chairman made in contravention of the Articles of Association is invalid, and a resolution carried by the casting vote of a person so appointed is inoperative even though the irregular appointment has been acquiesced in by the board.³

If the Articles authorise it, but not otherwise,⁴ the board may delegate any of its powers to a committee, which may consist even of a single director,⁵ but the board does not by making such delegation lose its power to act in the matter,⁶ and the board cannot deprive itself of power to control the company's business.⁷ Each director has not alone power to bind the company unless he has had this power specially delegated to him.⁴ Nor can a number of the directors, even although they constitute a majority, act without meeting or at a meeting of which notice has not been given to the whole body,⁸ and acts done by a majority of the board not duly convened as a board meeting (*e.g.* on the occasion of a general meeting of the company) are not valid.⁹ Pickford, J.,

¹ *Barron v. Potter*, [1914] 1 Ch. 895.

² See pages 289 and 290, *supra*. *Transvaal Lands Co. v. New Belgium Co.*, [1914] 2 Ch. 488, is one of the most recent cases and fully expresses the Rule.

³ *Clark v. Workman*, [1920] 1 L. R. 107.

⁴ *Howard's Case*, [1860] 1 Ch. 561.

⁵ *Taurine Co.*, [1884] 25 Ch. D. 118; *Harris's Case*, [1872] 7 Ch. 587; *Umney v. Fireproof Doors, Limited*, [1916] 2 Ch. 145. Compare *Horn v. Faulder & Co.*, [1908] 90 L. T. 524.

⁶ *Huth v. Clarke*, [1891] 63 L. T. 348.

⁷ *Horn v. Faulder & Co.*, [1908] 90 L. T. 524.

⁸ *Portuguese Copper Mines*, [1889] 42 Ch. D. 160; *Homer Gold Mines*, [1888] 39 Ch. D. 546; *re Bank of Syria*, [1900] 2 Ch. 272, [1901] 1 Ch. 118.

⁹ *Barber's Case*, [1877] 5 Ch. D. 963, where the nomination of a person approved by six out of seven directors was held not sufficient.

held that where a resolution of the directors required bills of exchange to be signed by a director and the secretary, a bill signed by a director only was not binding on the company, even in the hands of a holder who did not know of the restriction,¹ but this has been overruled in the Divisional Court.²

The Articles often provide that a letter signed by all or a majority of the directors shall have the same effect as a resolution of the board. In the absence of such a provision the directors cannot act without meeting.³ Fry, L. J., has suggested that without meeting directors cannot think,⁴ and a collective opinion certainly appears to be contemplated by the Acts.

The directors must not exclude any of their body from their meetings, and unless the company has by resolution declared that it does not desire a director to act,⁵ an excluded director can obtain an injunction restraining his continued exclusion.⁶

The directors are the proper persons to do any act in the name of the company, and in particular to commence actions in the name of the company, to make contracts, and to affix the seal of the company to deeds. The questions relating to actions are discussed below under the heading "ACTIONS BY AND AGAINST THE COMPANY," page 328, *infra*.

Unless the Articles require directors to conform to directions given by the company in general meeting, the company cannot, except by special resolution, take the conduct of the business out of the directors' hands, or compel them to adopt a particular line of action, such as sealing a draft deed or effecting a sale of the company's property.⁷ The usual Article, such as Clause 71 of Table A, requires a special resolution for "regulations" to control the directors,⁷ and where Articles gave the directors power to appoint a managing director it was held the company in general meeting could not interfere, although another Article empowered them to manage only subject to such regulations as the company might prescribe⁸; but if the directors are unable or unwilling to exercise the powers confided to them, whether by

¹ Premier Industrial Bank v. Carlton Manufacturing Co., [1909] 1 K. B. 106.

² Dey v. Pullinger Engineering Co., [1921] 1 K. B. 77.

³ D'Arcy v. Tamar Hill Railway Co., [1867] L. R. 2 Ex. 158; Haycraft Gold Reduction Co., [1900] 2 Ch. 230; Homer District Mines, [1888] 39 Ch. D. 546. On the other hand see Collier's Claim, [1871] 12 Eq. 246, 258, and Southern Counties Deposit Bank v. Rider, [1895] 73 L. T. 374.

⁴ Portuguese Copper Mines, [1889] 42 Ch. D. 160.

⁵ Bainbridge v. Smith, [1889] 41 Ch. D. 402, 471; Harben v. Phillips, [1883] 23 Ch. D. 14, 40.

⁶ Pulbrook v. Richmond Consolidated Mining Co., [1878] 9 Ch. D. 610.

⁷ Automatic Self-Cleansing Filter Co. v. Cunningham, [1906] 2 Ch. 34; Gramophone and Typewriter, Limited, v. Stanley, [1908] 2 K. B. at page 105, Salmon v. Quinn & Axtens, [1900] App. Ca. 442.

⁸ Thomas Logan v. Davis, [1911] 101 L. T. 914, 105 L. T. 419.

there being no independent quorum or by disputes among the directors, the company in General Meeting can perform the duties which the directors fail to carry out.¹

The cases on the question of the effect of an irregularity upon acts affecting shareholders are conflicting. It has been held that, notwithstanding the provisions of Section 67 of the Act of 1862 (now Sections 71 and 74 of 1908) referred to below, if the directors are not properly appointed according to the Articles of Association,² or if they continue to act without re-election,³ they cannot allot shares, make valid calls, or forfeit shares, these being matters between the company and the shareholders. Equally, if the Articles fix a minimum number of directors, a smaller number cannot act, and anything they purport to do is invalid unless power is given to act notwithstanding vacancies.⁴ But, on the other hand, the Court of Appeal has held that if the Articles contain provisions that acts shall be valid notwithstanding any irregularity subsequently discovered, shareholders as well as strangers are bound by and may take advantage of such acts, the irregularity being cured by such an Article even though the facts constituting the irregularity are known, provided that the directors act in good faith and believe that they have power to do the act in question⁵; and a meeting of the company ordered to be called by directors not forming a quorum may pass valid resolutions,⁶ while a call made by directors appointed at a meeting irregularly summoned is also valid.⁷

If directors not properly appointed, or otherwise acting irregularly, have dealings with strangers who do not know of the irregularity, they will be treated as agents of the company, which will be bound by their acts.⁸ In other words, if an act is apparently lawful and within the powers of the directors, a person dealing with them may assume that all necessary steps have been taken and conditions fulfilled, unless he has notice to the contrary, the maxim being *Omnia presumuntur rite esse acta*.⁹ So if directors

¹ *Barron v. Potter*, [1911] 1 Ch. 895, *Foster v. Foster*, [1916] 1 Ch. 632.

² *London and Southern Counties Land Co.*, [1886] 31 Ch. D. 223; *Garden Gully United Quartz Mining Co. v. McLister*, [1875] 1 App. Ca. 39; *Howbench Coal Co. v. Teague*, [1900] 5 H. & N. 151.

³ *Tyne Mutual Association v. Brown*, [1806] 74 L. T. 283.

⁴ *Alma Spinning Co.*, [1881] 16 Ch. D. 681, *Scottish Petroleum Co.*, [1883] 23 Ch. D. 413.

⁵ *Dawson v. African Consolidated Co.*, [1899] 1 Ch. 6; *British Asbestos Co. v. Boyd*, [1903] 2 Ch. 430; *Channel Collieries Trust v. Dover Railway Co.*, [1914] 2 Ch. 506.

⁶ *Southern Counties Deposit Bank v. Rider*, [1895] 73 L. T. 374.

⁷ *Briton Medical Association v. Jones*, [1880] 61 L. T. 384.

⁸ *County Life Assurance Co.*, [1870] 5 Ch. 288; *Mahony v. East Holyford Mining Co.*, [1874] L. R. 7 H. L. 869; *County of Gloucester Bank v. Rudry Merthyr Co.*, [1895] 1 Ch. 629; *re Bank of Syria*, [1900] 2 Ch. 272, [1901] 1 Ch. 115.

⁹ *Royal British Bank v. Turquand*, [1856] 6 E. & B. 327, *Clarke v. Imperial Gas Light and Coke Co.*, [1833] 4 B. & Ad. 315, *ex parte Overend, Gurney & Co.*, [1869] 4 Ch. 460.

have power of delegation a stranger may assume it has been properly exercised,¹ and this applies in the case of bills of exchange executed by persons having apparent but not actual authority.² Actual³ or constructive⁴ notice of the irregularity, however, deprives the party dealing with the company of this protection. Circumstances may put a party upon inquiry. For instance, where the sole director of a "one man" company made a practice of paying cheques, crossed and uncrossed, drawn in favour of the company, into his private account, the bank was held to be put on inquiry, and liable to the company for the conversion of the cheques, and not entitled to the protection of Section 82 of The Bills of Exchange Act, 1882, in respect of the cheques which were crossed.⁵ In ordinary circumstances a notice will not be binding unless given to an officer in the course of the company's business, or in such circumstances that it was his duty to communicate it to the company.⁶ Thus, one of two companies having directors in common will not be taken to have notice of the manner in which the acts of the other are carried out,⁷ and the same rule applies in the case of companies having a common secretary.⁸ Since persons dealing with a company are deemed to have notice of all matters contained in the Memorandum and Articles, any agreement inconsistent with these will give the party contracting no right of action.⁹

The directors are trustees of the powers reposed in them for the benefit of the company, and in allotting shares, making calls, forfeiting shares, approving transfers, and paying preliminary expenses they must act for the benefit of the company, and not for that of themselves or their friends, or for one class of shareholders at the expense of another (see page 290, *supra*). They cannot by a contract deprive themselves of power to control a manager so as to confer powers on him to the exclusion of

¹ *Totterdell v. Fareham Blue Brick Co.*, [1866] L. R. 1 C. P. 674; *Biggerstaff v. Rowatt's Wharf*, [1896] 2 Ch. 93.

² *Dey v. Pullinger Engineering Co.*, [1921] 1 K. B. 77, overruling *Premier Industrial Bank v. Carlfon Manufacturing Co.*, [1909] 1 K. B. 106.

³ *Wandsworth Gas Light Co. v. Wright*, [1870] 22 L. T. 404.

⁴ *Irvine v. Union Bank of Australia*, [1877] 2 App. Ca. 366.

⁵ *Underwood (A.L.) v. Bank of Liverpool and Martins*, [1924] 1 K. B. 775.

⁶ See cases cited in next note and *Fenwick, Stobart & Co.*, [1902] 1 Ch. 507.

⁷ *Hampshire Land Co.*, [1896] 2 Ch. 743; *Marseilles Extension Railway Co.*, [1872] 7 Ch. 161; *Young v. David Payne & Co.*, [1904] 2 Ch. 608.

⁸ *Fenwick, Stobart & Co.*, [1902] 1 Ch. 507.

⁹ *Ernest v. Nicholls*, [1857] 6 H. L. 401 to 410; *Fountaine v. Carmarthen Railway Co.*, [1868] L. R. 5 Eq. 322.

themselves.¹ As to the incapacity of directors to make any contract in which they have a conflicting interest or duty see page 290, *supra*.

Minutes must be kept of all proceedings and resolutions at every meeting of directors (Section 71, Sub-section 1), and such minutes, when signed by the chairman of that or the next succeeding meeting, are evidence of the proceedings (Section 71, Sub-section 2), and, until the contrary is proved, every such meeting is deemed to have been duly held and convened, and all proceedings to have been duly had, and all appointments of directors, managers, or liquidators shall be deemed to be valid (Section 71, Sub-section 3), and the acts of a director or manager are valid notwithstanding any defect which may afterwards be discovered in his appointment or qualification (Section 74: see also Clauses 75 and 94 of the new Table A).

If there is no record in the minutes of a resolution the Courts will assume that no such resolution was passed, but direct evidence will be admitted to show that the minutes are inaccurate and have omitted something which in fact was done (see page 365, *infra*).

A minute signed by the chairman is a sufficient memorandum to satisfy the Statute of Frauds.² The case cited is express upon the point, but attention does not appear to have been called to the fact that the chairman is not a person authorised either to contract on behalf of the company or to sign any memorandum so as to bind the company.

The adoption of minutes at a subsequent meeting of directors does not make those taking part in such adoption responsible for the acts done at the earlier meeting if such acts were complete before the minutes came up for consideration³ (see page 365, *infra*).

Unless the Articles stipulate as to the amount of time a director shall devote to the company, there is no way of compelling him to attend to his duties, and a company cannot prevent one of its own directors from becoming a director of a rival institution.⁴

Liability of Directors.

Directors, as agents of the company, are not liable to strangers for the acts or defaults of the company, nor for the performance of the company's contracts. In making bills of exchange, however,

¹ *Horn v. Faulder & Co.*, [1908] 99 L. T. 524.

² *Jones v. Victoria Graving Dock Co.*, [1877] 2 Q. B. D. 314.

³ *Lands Allotment Co.*, [1894] 1 Ch. at page 634; *Burton v. Bevan*, [1908] 2 Ch. 240; *Lucas v. Fitzgerald*, [1905] 20 Times L. R. 16.

⁴ *London and Mashonaland Co. v. New Mashonaland Co.*, [1891] W. N. 165.

they must be careful not to use forms which pledge their personal credit. Thus, "We, the directors of the A. B. Co., do promise to pay," &c., signed by the directors, will make them personally liable, although the company also execute the note.¹ But "I promise to pay," &c., signed "J. H. Smethurst's Laundry, Limited: J. H. Smethurst, Managing Director," was held not to make the director personally liable²; while "I promise to pay," &c., signed "For the M. Railway Company, J. S., Secretary,"³ or "We jointly promise to pay £600 for value received in stock on account of the company," signed by three directors,⁴ was held only to bind the company. The liability on bills which do not correctly state the company's name is set forth at page 15, *supra*.

Directors may, however, be liable to strangers for wrongs done by them, for it is no answer to an action for tort that the wrongdoer was an agent for another. They may also be liable for representing that they have an authority to borrow when in fact they have none (see page 221, *supra*).

A director is liable to make good any money the company has entrusted to him for the purpose of being dealt with according to the provisions of the Memorandum and Articles which has not been dealt with in that way, but in some way not authorised, although he has derived no benefit from the money and the payment has been made with no corrupt motive.⁵ "As soon as the conclusion is arrived at that the company's money has been applied by the directors for purposes which the company cannot sanction, it follows that the directors are liable to replace the money, however honestly they may have acted"⁶ And, again, "if directors who are *quasi* trustees for the company improperly pay away the assets to the shareholders, they are liable to replace them."⁷ In other words, not only is a director liable for a misappropriation, but also for a misapplication of the money of the company, though it has not found its way into his own pocket,⁸ and on this ground a director is liable to make good money which he has applied for any purpose which is *ultra vires*; but he is not liable "for losses which the company may

¹ Dutton v. Marsh, [1871] 6 Q. B. 361.

² Chapman v. Smethurst, [1909] 1 K. B. 927.

³ Alexander v. Sizer, [1869] L. R. 4 Ex. 102.

⁴ Lindus v. Melrose, [1857] 2 H. & N. 293, 3 H. & N. 177.

⁵ *Ex parte Pelly*, [1882] 21 Ch. D. 402, see page 509.

⁶ *Per* Lindley, L. J., in *re Sharpe*, [1902] 1 Ch. at pages 165 and 166.

⁷ *Per* Jessel, M. R., *Flitcroft's case*, [1882] 21 Ch. D. at page 531.

⁸ A director has, however, the protection of Section 279 in the case of honest mistake (see page 316, *infra*); *Cluridge's Patent Asphalt Co.*, [1921] 1 Ch. 543.

suffer by reason of mistakes or errors of judgment.”¹ Instances of this liability are given in Book III., Chapter IV., under the heading “PROCEEDINGS AGAINST DELINQUENT DIRECTORS, PROMOTERS, AND OFFICERS” (page 588, *infra*). The same acts which create liability for misfeasance under Section 215 render the directors liable to an action at law before a winding up, in which case the company will be the proper plaintiff.

Those who join in any misapplication of money are jointly and severally liable to make good the loss to the company, but not for the acts of others in which he has had no part. Only those actually implicated are responsible,² although knowledge and sanction of misconduct are enough to create liability, even in the absence of actual participation in the misconduct³; each director being liable for money improperly received by himself, or by himself jointly with others,⁴ or the misappropriation of which he has sanctioned. He is not liable for breaches of trust of which he is ignorant, or which occurred before he became a director,⁵ nor for the misapplication by others of a cheque which he joined in drawing for a lawful purpose.⁶ Mere presence at the meeting at which the minutes setting forth the resolutions relating to the wrongful act were read and signed will not create liability in one who took no part in the wrongful act⁷; but participation in carrying out an improper dealing with the property of the company will create a liability, even though the director may not have been party to or may have protested against the resolution sanctioning the transaction.⁸ On the other hand, a director who has agreed to a course of practice which results in loss is not responsible where he has taken no part in the misapplication of the money.⁹ “It should be understood that a director consenting to be a director has assumed a position

¹ *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 423; *Overend, Gurney & Co. v. Gibb*, [1872] L. R. 5 H. L. 480.

² *Weir v. Barnett*, [1877] 3 Ex. D. 32; *Weir v. Bell*, [1878] 3 Ex. D. 238; for directors are not agents for each other.

³ *Land Credit Co. v. Lord Fermoy*, [1870] 5 Ch. 73; *Joint Stock Discount Co. v. Brown*, [1869] 8 Eq. 381; *Montrotier Asphalte Co.*, [1876] 34 L. T. 716.

⁴ *Parker v. McKenna*, [1875] 10 Ch. 96; *Oxford Benefit Building Society*, [1887] 35 Ch. D. 502; *Lands Allotment Co.*, [1894] 1 Ch. 616.

⁵ *Forest of Dean Coal Co.*, [1879] 10 Ch. D. 450; *Ashurst v. Mason*, [1875] 20 Eq. 225; *Cullerne v. London and Suburban Building Society*, [1890] 25 Q. B. D. 485.

⁶ *Montrotier Asphalte Co.*, [1876] 34 L. T. 716.

⁷ *Lands Allotment Co.*, [1894] 1 Ch. 617; *Lucas v. Fitzgerald*, [1905] 20 T. L. R. 16 (*Interim Dividend*); *Burton v. Bevan*, [1908] 2 Ch. 240.

⁸ *Joint Stock Discount Co. v. Brown*, [1869] 8 Eq. 381; *Ramskill v. Edwards*, [1885] 31 Ch. D. 100.

⁹ *Cullerne v. London and Suburban Building Society*, [1890] 25 Q. B. D. 485.

involving duties which cannot be shirked by leaving everything to others"¹; but failure to attend directors' meetings will not render the absentee liable for the acts done by his co-directors at those meetings.²

As agents of the company, any profit which the directors make without the knowledge and consent of the company out of the transactions of the company beyond their proper remuneration belongs to the company.³ The rules of the Court "lay down firmly that no director of a company can, in the absence of any stipulation to the contrary, be allowed to be a partaker in any benefit whatever from any contract which requires the sanction of a board of which he is a member."⁴ Unfortunately, it is so common for persons in a position of trust to make secret profits that the question is continually before the Courts. A summary of the cases will be found under the heading "SECRET PROFITS AND COMMISSIONS," page 324, *infra*. Directors, however, may purchase shares from other members, and in such a case are not bound to disclose pending negotiations which if successful will enhance the value of the shares.⁵

Directors cannot make presents to themselves or to one of their body out of the funds of the company,⁶ nor can such a gift be ratified by the company by a resolution which is carried by the votes of the directors themselves.⁷

When dealing with a fellow-director the board should exercise special care that the company is fairly treated, and if upon a reconstruction special provisions are made for the benefit of directors they must be disclosed, or the sanction of the members to the scheme will be inoperative.⁸

Directors, like other agents, are liable for neglect of their duty, although not for errors of judgment. The amount of negligence required to create such a liability has been discussed in the cases mentioned below.⁹ It is said to be something more than ordinary

¹ *Per* Byrne, J., in *Drineqhier v. Wood*, [1899] 1 Ch. 406.

² *Marquis of Bute's Case*, [1802] 2 Ch. 100.

³ *Morison v. Thompson*, [1874] L. R. 9 Q. B. 490; *Hay's Case*, [1875] 10 Ch. 503.

⁴ *Per* Hatherley, L. C., in *Imperial Mercantile Association v. Coleman*, [1871] 6 Ch. 567. Usually, however, the Articles allow a director to participate in benefits if he makes disclosure to his co-directors and does not vote on the matter.

⁵ *Percival v. Wright*, [1902] 2 Ch. 421.

⁶ *Re George Newman & Co.*, [1895] 1 Ch. 674.

⁷ *Cook v. Deeks*, [1916] App. Ca. 554.

⁸ *Kaye v. Croydon Tramways*, [1898] 1 Ch. 358; *Clarkson v. Davies*, [1923] A. C. 100.

⁹ *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch., by Romer, J., at page 418; by Lindley, M. R., at page 435; by Collins, L. J., at page 466. See also *Ovrend, Gurney & Co. v. Gibb*, [1872] L. R. 5 H. L. 480, and *Marzetti's Case*, [1880] 28 W. R. 541.

negligence, and is sometimes described as "gross negligence." But what is "gross negligence" is difficult to define. From the cases it appears to be failure to exercise reasonable care, or such care as a prudent man would exercise in his own affairs, and this is surely the same as "negligence"; yet the Court of Appeal states that "it must be in a business sense culpable or gross."¹ Directors are not liable for losses arising from relying upon trusted officers of the company who have misled them as to the true position of affairs.²

Where the Articles contain a provision that a director shall not be liable for any loss "except the same happen through his own dishonesty," this has been held to be an answer to a claim for damages for losses arising by negligence.³

Section 279 contains the following provision for protecting directors, which is borrowed from the Trustee Act:—"If in any proceeding against a director, or person occupying the position of director, of a company for negligence or breach of trust it appears to the Court hearing the case that the director or person is or may be liable in respect of the negligence or breach of trust, but has acted honestly and reasonably, and ought fairly to be excused for the negligence or breach of trust, that Court may relieve him, either wholly or partly, from his liability on such terms as the Court may think proper." This may save directors from liability where acts have been done which have proved to be *ultra vires*, but were done in good faith.⁴ Apart from the provision, a director who had paid away money without authority is liable to account for it, however good his intentions and reasonable his belief that he had authority.⁵ It is, however, not easy to see in what cases a director guilty of sufficient negligence to render him liable can be said to have acted reasonably. The relief can only be granted when proceedings have actually been commenced, and the Court can impose terms as a condition of granting the relief.

¹ Compare *Overend, Gurney & Co. v. Gibb*, [1872] L. R., 5 H. L. at pages 491 and 495; *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. at pages 435 to 466; *National Bank of Wales*, [1899] 2 Ch. at page 671; *Dovey v. Cory*, [1901] App. Ca. at page 490; and as to the words "gross negligence" having no meaning beyond omission of reasonable care, *Giblin v. McMullen*, [1899] L. R. 2 P. C. at page 330.

² *Dovey v. Cory*, [1901] App. Ca. 477, *Prefontaine v. Gronier*, [1907] App. Ca. 101.

³ *Brazilian Rubber Plantations*, [1911] 1 Ch. 425, where the amount of negligence necessary to constitute a cause of action was also discussed.

⁴ *Claridge's Patent Asphalte Co.*, [1921] 1 Ch. 543. It has been held under The Judicial Trustees Act, 1896, that such relief may be obtained at the hearing of an action although not pleaded (*Singlehurst v. Tapscott Steamship Co.*, [1899] W. N. 133).

⁵ *Ex parte Pelly*, [1882] 21 Ch. D. 492, 508.

Where one of several directors has been rendered liable for a misapplication of the company's money he can recover contribution from any of the other directors who were liable,¹ and this liability to contribution is not determined by death or bankruptcy,¹ nor does the Statute of Limitations commence to run until the claim has been established against the director seeking contribution.² If several directors are sued together the order for payment is made against them jointly and severally.

In the case of the death of a director his estate remains liable for any breach of trust he may have committed (including any wrongful dealing with the company's property, such as a payment of dividend out of capital or sale of its assets at an undervalue)³; but not for negligence unless the money lost came into testator's hands,⁴ or trespass, or deceit,⁵ unless his estate has benefited by the fraud.⁶

A discharge in bankruptcy does not release a director from liability for a breach of trust¹ or a claim for a refund of secret profits, for the retention of them is a breach of trust.⁷

After the lapse of six years the Statute of Limitations is a bar to proceedings against a director for misfeasance, unless the claim is founded upon any fraud or fraudulent breach of trust, or is to recover trust property or the proceeds thereof still retained by the director, or previously received by him and converted to his own use,⁸ and even in the case of a bribe taken by a director and fraudulently concealed, by analogy to the Statute of Limitations, the Courts will require the action to be brought within six years of the company knowing that the bribe had been taken, or that a charge was made against the director to that effect.⁹

Directors are not liable for the fraud or misconduct of other persons employed by the company¹⁰ or of their co-directors¹¹ unless

¹ *Ramskill v. Edwards*, [1886] 31 Ch. D. 100.

² *Robinson v. Harkin*, [1896] 2 Ch. 415.

³ *Ramskill v. Edwards*, [1886] 31 Ch. D. 100, *re Shupe*, [1892] 1 Ch. 154, *Concha v. Murietta*, [1889] 40 Ch. D. at page 553.

⁴ *Overend, Gurney & Co. v. Gurney*, [1869] 4 Ch. 701, 713.

⁵ *Phillips v. Homfrey*, [1883] 24 Ch. D. 439.

⁶ *Peck v. Gurney*, [1874] L. R. 6 H. L. 377.

⁷ *Emma Silver Mining Co. v. Grant*, [1881] 17 Ch. D. 122.

⁸ *Lands Allotment Co.*, [1894] 1 Ch. 617; and *Trustee Act*, 1888, Section 8.

⁹ *Metropolitan Bank v. Heiron*, [1880] 5 Ex. Div. 319; *National Company for the Distribution of Electricity*, [1902] 2 Ch. 34.

¹⁰ *Weir v. Barnett*, [1877] 3 Ex. D. 32; *Weir v. Bell*, [1878] 3 Ex. D. 238; *Cargill v. Bower*, [1878] 10 Ch. D. 502. *Booth v. Helliwell*, [1914] 3 K. B. 252.

¹¹ *Chadwick v. Adams & Co.*, [1892] 85 Ch. D. 770.

they have participated in the wrongdoing, for the company's servants are not the agents of the directors.¹

A director who incurs liability in acting as agent for the company is entitled to indemnity by the company, and this extends to the costs of successfully defending an action for an alleged libel contained in a report he is employed by the company to make.²

Where vendors become directors they frequently enter into agreements to manage for a term of years, and covenant not to trade in competition with the company. If the company wrongfully discharges such a manager, either directly or by going into liquidation, he is freed from his covenant, and may at once commence a competing business.³

Directors are criminally liable if they keep fraudulent accounts, wilfully destroy books, or publish fraudulent statements with intent to deceive or defraud (Larceny Act, 1861, Sections 82 and 84); also if in any return, report, certificate, balance sheet, or other document required by or for the purpose of the Act specified in the Fifth Schedule they wilfully make a statement false in any material particular, knowing it to be false (Section 281: see page 347, *infra*). They are also liable under The Prevention of Corruption Act, 1906, if they corruptly accept gifts in relation to the affairs of their company (see page 324, *infra*).

Extending the Liability of Directors.

A company may, at the time of its registration, make provision in its Memorandum of Association for the liability of its directors, managers, or managing director being unlimited; or it may, after its registration, alter its memorandum so as to make the liability of its directors or managers unlimited by passing and confirming a special resolution, if so authorised by its Articles (Sections 60 and 61). A company thus constituted is very like a limited partnership: the liability of the managing partners (*i.e.* the directors) is unlimited; that of the sleeping partners (*i.e.* the other shareholders) is limited to the amount of their shares.

The directors and managers and the member proposing a person for the office of director where the liability is unlimited must add to their or his proposal a statement that the liability

¹ *Weir v. Barnett*, [1877] 3 Ex. D. 32, *Weir v. Bell*, [1878] 3 Ex. D. 238, *Cargill v. Bower*, [1878] 10 Ch. D. 502; *Booth v. Hellwell*, [1914] 3 K. B. 252.

² *Famatina Development Corporation*, [1914] 2 Ch. 271.

³ *General Billposting Co. v. Atkinson*, [1909] App. Ch. 118; *Messum's Brothers v. Messums*, [1910] 2 Ch. 248.

of the person holding the office will be unlimited; and the promoters, manager, and secretary of the company, or one of them, must give the person proposed for election notice in writing, before he accepts office, that his liability will be unlimited. Any director, manager, or other officer of the company, or proposer of a person as director, making default in this respect will be liable to a penalty of one hundred pounds, and will also be liable for any damage which the person elected may incur from such default. The liability of the person elected will, however, not be affected by the default (Section 60, Sub-section 3).

SECRET PROFITS AND COMMISSIONS.

A principal can recover from his agent any profit the latter has made out of a dealing taking place in the course of the agency unless it was with both the knowledge and the consent of the principal.¹ "The law on the subject is well and compendiously stated in 'Story on Agency,' Section 211, in the following terms: 'Indeed it may be laid down as a general principle that in all cases when a person is, either actually or constructively, an agent for other persons, all profits and advantages made by him in the business, beyond his ordinary compensation, are to be for the benefit of his employers.'"² If, therefore, directors or other agents have received shares (*e.g.* from a promoter) secretly, the company can claim either the shares themselves, or if they have been sold at a profit the whole profit, or if no profit has been made the company may say, "You deprived us of the power of allotting the shares to other persons; therefore, you must pay us the sum we have lost by reason of our being deprived of the right of allotting those shares to others who would have paid them up" (*i.e.* in cases where allotments have been made to others at par, the nominal value of the shares³), and any other profit made without the knowledge and sanction of the company must equally be accounted for to the company."⁴

The principle is that the master can claim the profit as soon as he learns that it has been made unless he has previously consented to his servant taking the profit; but if after learning the facts he takes no steps, he may be inferred to have consented to what has been done; but to arrive at this conclusion all the facts must be taken into account.

¹ *Parker v. McKenna*, [1874] L. R. 10 Ch. 96; *Hay's Case*, [1875] 10 Ch. 503.

² By the Court in *Morison v. Thompson*, [1874] L. R. 9 Q. B. at page 485.

³ *Carling's Case*, [1876] 1 Ch. D. 115 to 126; see also *Postage Stamp Co.*, [1892] 3 Ch. 506.

⁴ *Imperial Mercantile Credit Association v. Coleman*, 1873] L. R. 6 H. L. 189, and cases cited in preceding notes.

The following statement of the law, laid down by Bowen, L. J., in the *Boston Deep Sea Fishing Co. v. Ansell* (1888, 39 Ch. D. 339), should be borne in mind. It applies to directors, managing directors, secretaries, managers, solicitors, and all other officers and servants of a company, but is very frequently forgotten:—

“There can be no question that an agent employed by a principal, or master to do business with another, who, unknown to that principal or master, takes from that other person a profit arising out of the business which he is employed to transact, is doing a wrongful act, inconsistent with his duty towards his master and the continuance of confidence between them. He does the wrongful act whether such profit be given to him in return for services which he actually performs for the third party, or whether it be given to him for his supposed influence, or whether it be given to him on any other ground at all. If it is a profit which arises out of the transaction, it belongs to his master, and the agent or servant has no right to take it, or keep it, or bargain for it, or to receive it without bargain, unless his master knows it.”

In the case in question it was accordingly held that a company could dismiss without notice a manager who had secretly accepted a commission from shipbuilders executing work for the company.

It makes no difference that the profit or advantage is one which the principal could not have made for himself, or that the other contracting party refused to deal with the principal himself.¹ In the case of directors, unless there is an Article authorising them to contract with the company on making disclosure to their co-directors, a profit will be secret and recoverable by the company unless it is sanctioned by a general meeting.²

The principle above referred to, that a director may not make profit out of a dealing with the company, does not depend upon any provision in the Articles. It is a principle of law, dependent upon the duties of any person in a fiduciary position to his principal³; but the company may stipulate not to take advantage of this right upon specified terms,⁴ and not infrequently the Articles provide that directors may contract with the company, provided that they disclose their interest to their co-directors and

¹ *Keech v. Sandford*, [1726] 2 White and Tudor, L. C. 693; *Boston Deep Sea Fishing Co. v. Ansell*, [1888] 39 Ch. D. 339, *Costa Rica Railway Co. v. Forwood*, [1901] 1 Ch. at page 761.

² See *per Hatherley*, L. C., *Imperial Mercantile Credit Association v. Coleman*, [1871] 6 Ch. at page 567.

³ *Imperial Mercantile Credit Association v. Coleman*, [1871] 6 Ch. 558, [1873] L. R. 6 H. L. 189; *Great Luxembourg Railway Co. v. Magnay*, [1858] 25 Beav. 587; *Benson v. Heathorn*, [1842] 1 Y. & C. Ch. 326.

⁴ *Per Lord Hatherley* in *Imperial Mercantile Credit Association v. Coleman*, [1871] 6 Ch. at page 568; *Costa Rica Railway Co. v. Forwood*, [1901] 1 Ch. 746.

do not vote upon the contract. Such a provision is valid, and is a protection to a director so contracting if he comply with the condition—that is to say, disclose his interest and abstain from voting; but if he fail to comply he will be liable as if there were no such Article,¹ and if required to disclose his interest he must disclose, not only that he has an interest, but the nature and amount of it.² The reason for disclosure to co-directors not being sufficient unless expressly authorised by the Articles is that the company is entitled to have the independent judgment of the whole board on every matter, and an interested director cannot give an independent judgment.³ Although the failure to disclose the amount of the interest is misconduct and a ground for setting the contract aside, if that still be possible, the profit made by the director who has disclosed that he is making some profit upon a sale to the company cannot be recovered as an alternative remedy when rescission has, owing to the change of circumstances, become impossible.⁴ It must be noted, however, that for a director to sell a property already his own to the company at an enhanced price does not entitle the company to claim the profit; its remedy is to rescind the contract, returning the property; but if that has become impossible it cannot claim either the profit or damages.⁵

The company can recover the amount of the commission or bribe, not only from the servant or agent in default, but also from the person giving the bribe, and it is no answer for such person to show that the company has already recovered the amount from or made an arrangement with the agent.⁶ The giver of the commission must himself inform the principal that he is making a payment to the agent, and will not escape liability by alleging that he hoped or believed the agent would make the proper disclosure,⁷ and the form of action may be either for money had and received to the use of the plaintiff or for deceit,⁷ or, if it be still possible, the employer may elect to rescind the contract

¹ *Costa Rica Railway Co. v. Forwood*, [1901] 1 Ch. at page 757.

² *Imperial Mercantile Credit Association v. Coleman*, [1873] L. R. 6 H. L. 189; *Dunne v. English*, [1874] 18 Eq. 524. *Turnbull v. West Riding Athletic Club*, [1894] W. N. 4, 70 L. T. 92.

³ *Per* Lord Hatherley, *Imperial Mercantile Credit Association v. Coleman*, [1871] 6 Ch. at pages 567 and 568.

⁴ *Lady Forrest (Murchison) Gold Mine*, [1901] 1 Ch. 582; *Burland v. Earle*, [1902] A. C. 98.

⁵ *Jacobus Marler Estates v. Marler*, [1913] 114 L. T. 640 note; 85 L. J. (P. C.) 167 note; *Cook v. Deeks*, [1916] App. Ca. 531.

⁶ *Salford Corporation v. Lever*, [1891] 1 Q. B. 168, *Grant v. Gold Exploration Syndicate*, [1900] 1 Q. B. 232; *Hovenden v. Millhoff*, [1900] 83 L. T. 41.

⁷ *Per* Collins, L. J., in *Grant v. Gold Exploration Syndicate*, [1900] 1 Q. B. 248.

in respect of which the commission was paid,¹ and the following propositions have been laid down² by Romer, J. J., in the Court of Appeal:—

“First, the Court will not inquire into the donor’s motive in giving the bribe, nor allow evidence to be gone into as to motive³; secondly, the Court will presume in favour of the principal, and as against the briber, that the agent was influenced by the bribe, and this presumption is irrebuttable; thirdly, if the agent be a confidential buyer of goods for his principal from the briber the Court will assume, as against the briber, that the true price of goods as between him and the purchaser must be taken to be less than the price paid to or charged by the vendor by, at any rate, the amount or value of the bribe.⁴ If the purchaser alleges loss or damage beyond this he must prove it.”

Moreover, if the agent has received a secret commission from a third party, the employer can, in addition to recovering the amount of such commission, refuse to pay the agent any commission or reward for the services he has rendered in connection with the transaction in question,⁵ and no custom to the effect that an agent should receive double commission without the knowledge of each of the parties to the dealing will be held good.⁶ But an agent who has received a bribe in one transaction is not disabled from recovering commission in respect of a different transaction.⁷

Where an agent receives a commission secretly, this does not become the property of the company to such an extent that it can follow the investments into which the money is put until a judgment has been obtained for the return of the amount. The relation is that of debtor and creditor, not of trustee and *cestui que trust*.⁸

Where a firm in which a director is partner receives profits in regard whereto the director has not made sufficient disclosure to the company, the other partners knowing the facts are equally liable to pay over to the company the profits,⁹ each partner being severally, as well as jointly with the others, liable for the whole.¹⁰

¹ *Panama Telegraph Co. v. India Rubber Telegraph Works*, [1875] 10 Ch. 515. *Grant v. Gold Exploration Syndicate*, *ubi supra*, *Hovenden v. Millhoff*, *ubi supra*.

² *Hovenden v. Millhoff*, *ubi supra*.

³ That is to say, it is no answer that the donor acted in good faith, intending no wrong (*Grant v. Gold Exploration Syndicate*, [1900] 1 Q. B. 249).

⁴ See also *Cohen v. Kuschke*, [1900] 83 L. T. 102.

⁵ *Andrews v. Ramsay*, [1903] 2 K. B. 635.

⁶ *Bartram v. Lloyd*, [1903] 88 L. T. 286.

⁷ *Nitedals Trædstikfabrik v. Bruster*, [1903] 2 Ch. 671.

⁸ *Lester & Co. v. Stubbs*, [1890] 45 Ch. D. 1.

⁹ *Imperial Mercantile Credit Association v. Coleman*, [1873] L. R. 6 H. L. at pages 203, 208.

¹⁰ *Cardiff Preserved Coal Co., ex parte Hill*, [1862] 32 L. J. Ch. 154.

A claim for repayment of a bribe must be brought within six years after the company learns that there is a charge of bribery made against the person implicated,¹ for in cases of concealed fraud the Statute of Limitations runs only from the discovery of the fraud.² But see page 151, note ², *supra*.

The Court will not enforce specific performance against the company of an agreement made with a director for his benefit,³ but a director can recover the amount of a loan and ordinary interest.⁴

By The Prevention of Corruption Act, 1906, any agent corruptly accepting or obtaining for himself or another any gift or consideration as an inducement or reward for doing or forbearing to do any act in relation to his principal's affairs or business, or for showing any favour in relation to such affairs, is guilty of a misdemeanour, and the person giving or offering the gift to an agent as an inducement to do or abstain from such an act or show such favour is equally guilty, as is any person giving or using a false receipt with intent to deceive the principal, and the penalty in each case is imprisonment, with or without hard labour, for not more than two years, or a fine not exceeding £500; but proceedings cannot be taken without the consent of the law officers.

This Act appears to cover most of the cases where an agent takes or is offered a bribe, and it will apply to agents' of companies as well as of individuals.

ACTIONS BY AND AGAINST THE COMPANY. SUIT BY A SHAREHOLDER ON BEHALF OF HIMSELF AND OTHERS.

The proper persons to give instructions for the commencement of an action to enforce any right of the company, or to obtain redress for a wrong done to the company, or to recover its property, are the directors; and the company itself is the only proper plaintiff in such an action.⁵ Whether before or in a liquidation the company's name alone should appear as plaintiff, it being improper to add the directors or liquidators as plaintiffs unless some relief is claimed by them in their individual capacity.

Although the directors are the proper persons to give the instructions for commencing such an action, it was long ago held

¹ *Metropolitan Bank v. Heiron*, [1880] 5 Ex. Div. 319, *Re Sale Hotel, ex parte Hesketh*, [1897] 77 L. T. 681, 78 L. T. 368; *re Sharpe*, [1892] 1 Ch. 154, 172.

² *Gibbs v. Guild*, [1892] 9 Q. B. D. 59, *North American Land Co. v. Watkins*, [1904] 1 Ch. 242 and 2 Ch. 233.

³ *Flanagan v. Great Western Railway Co.*, [1868] 7 Eq. 116.

⁴ *Imperial Mercantile Credit Association v. Coleman*, [1873] L. R. 6 H. L. at pages 203, 204.

⁵ *Gray v. Lewis*, [1873] 8 Ch. at page 1050; *Russell v. Wakefield Waterworks Co.*, [1875] 20 Eq. at page 479; *Duckett v. Gover* [1877] 6 Ch. D. 82; *Burland v. Earle*, [1902] App. Ca. 93.

that effect should be given to the wishes of a majority of the shareholders when they desire that proceedings should be taken to protect the company's rights, and that an action may be commenced in the company's name as plaintiff by such a majority, or even in case of urgency by one or more shareholders who believe that they have the support of a majority, and subsequently obtain the sanction of a resolution of the company.¹ An interim injunction may be obtained in such an action before the sanction has been procured, but if it ultimately appear that the majority is not in favour of the proceedings the name of the company as plaintiff will be struck out,² and if the company was the sole plaintiff the solicitor who has used its name, or if there is a co-plaintiff who instructed the solicitor, then that co-plaintiff will be ordered to pay the costs of the company as between solicitor and client, and the costs of the defendants as between party and party,³ and this order will be made even after the action has been discontinued.⁴ In cases such as the above it is sometimes suggested that in ascertaining whether the majority of the company approves of the action the votes of any directors or shareholders whose conduct is impugned in the action should be ignored, but this is in effect to determine the question of wrongdoing in advance, and is inadmissible.⁵

The rule that the company must be plaintiff in a case where its rights are in question is applied strictly where the act complained of is an irregularity either on the part of the directors or of the company in general meeting which could be regularised or ratified by the company at a properly constituted meeting,⁶ for it would be unreasonable to restrain the company or directors from acting upon a resolution irregularly passed when, by calling a meeting, the matter could be put in order at once. This rule is often expressed by saying that the Court will not and indeed has no jurisdiction to interfere with the internal affairs of the company for which a domestic tribunal has been constituted in a general

¹ *Pender v. Lushington*, [1877] 6 Ch. D. 70; *Imperial Hydropathic Hotel Co. v. Hampson*, [1883] 23 Ch. D. 1; *La Compagnie de Mayville v. Whitley*, [1890] 1 Ch. 803. It seems difficult to reconcile these cases with *Salmon v. Quinn & Axtens*, [1900] App. Ca. 142, and *Automatic Self Cleansing Filter v. Cunningham*, [1900] 2 Ch. 34; but they have been often followed.

² *Silber Light Co. v. Silber*, [1878] 12 Ch. D. 717; *East Pant Du Mining Co. v. Merryweather*, [1864] 2 H. & M. 251; *Ducket v. Gover*, [1877] 6 Ch. D. 82.

³ *Newbiggin Gas Co. v. Armstrong*, [1880] 13 Ch. D. 310; *La Compagnie de Mayville v. Whitley*, [1890] 1 Ch. at 804; *Marshall's Valve Gear v. Manning Wardle*, [1900] 1 Ch. 267.

⁴ *Gold Reefs of Western Australia v. Dawson*, [1867] 1 Ch. 115.

⁵ *Mason v. Harris*, [1878] 11 Ch. D. 97.

⁶ *Burland v. Earle*, [1902] App. Ca. at page 93; *Dominion Cotton Mills v. Amyot*, [1912] App. Ca. 546; *Gray v. Lewis* [1873] 8 Ch. 1035; *MacDougal v. Gardner*, [1870] 1 Ch. D. 13.

meeting¹; but it will be observed, as hereafter more particularly stated, that this does not apply where the company in general meeting either cannot or will not adopt the proceeding complained of, and it does not apply to a case where the matter in question requires a special resolution,² for to allow a company to ratify an act requiring the sanction of a special resolution by refusing to be party to proceedings would be to enable a bare majority to do that which can only be done by a three-quarters majority.

This rule, however, does not extend to a case where the act complained of is either illegal or *ultra vires*, or is a fraud upon the minority,³ and there is also an exception in cases where the act done, although regular in form, is unfair and oppressive as against the minority.⁴ In none of these cases can the company by resolution or otherwise ratify or render valid the act, and the Court will interfere to protect the minority, and in such a case one or more shareholders will be allowed to commence an action expressed to be "on behalf of themselves and all other the shareholders of the company other than the defendants," but in every such action the company must be made a defendant, so that the judgment which will be for the company's benefit may be made in its presence.

The rule is thus stated by Lord Davey in 1902⁵ in a passage which has frequently been quoted, and has been adopted again by the Privy Council in 1912.⁶ "It is an elementary principle of the law relating to joint stock companies that the Court will not interfere with the internal management of companies acting within their powers, and, in fact, has no jurisdiction to do so. Again, it is clear law that in order to redress a wrong done to the company, or to recover moneys or damages alleged to be due to the company, the action should *prima facie* be brought by the company itself. These cardinal principles are laid down in the well-known cases of *Foss v. Harbottle*⁷ and *Mozley v. Alston*,⁸ and in numerous later cases which it is unnecessary to cite. But an exception is made to the second rule where the persons against whom the relief is sought themselves hold and control the majority

¹ See particularly *MacDougall v. Gardner*, [1876] 1 Ch. 13, and *Burland v. Earle*, [1902] App. Ca. at page 93.

² *Baillie v. Oriental Telephone Co.*, [1915] 1 Ch. 503.

³ *Alexander v. Automatic Telephone Co.*, [1900] 2 Ch. 56; *Hope v. International Financial Society*, [1877] 4 Ch. D. 327, *Simpson v. Westminster Palace Hotel*, [1890] 8 H. L. C. 712; *Clunch v. Financial Corporation*, [1899] 4 Ch. 117.

⁴ *Consett v. Harris*, [1824] Turn. & Ryan, 496; *Meener v. Hooper's Telegraph Co.*, [1874] 9 Ch. 350; *Atwood v. Merryweather*, [1868] 5 Eq. 464 note, *Cook v. Deeks*, [1916] App. Ca. 554.

⁵ *Burland v. Earle*, [1902] App. Ca. at page 93.

⁶ *Dominion Cotton Mills v. Amyot*, [1912] App. Ca. 546.

⁷ [1843] 2 Hare 461.

⁸ [1847] 1 Ph. 700.

of the shares in the company, and will not permit an action to be brought in the name of the company. In that case the Courts allow the shareholders complaining to bring an action in their own names. This, however, is a mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress, and it is obvious that in such an action the plaintiffs cannot have a larger right to relief than the company itself would have if it were plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the shareholders, or are capable of being confirmed by the majority. The cases in which the minority can maintain such an action are, therefore, confined to those in which the acts complained of are of a fraudulent character or are beyond the powers of the company. A familiar example is where the majority are endeavouring directly or indirectly to appropriate to themselves money, property, or advantages which belong to the company, or in which the other shareholders are entitled to participate, as was alleged in the case of *Menier v. Hooper's Telegraph Co.*¹ It should be added that no mere informality or irregularity which can be remedied by the majority will entitle the minority to sue if the act when done regularly would be within the powers of the company and the intention of the majority of the shareholders is clear. This may be illustrated by the judgment of Mellish, L.J., in *MacDougall v. Gardiner*.² This passage has again been quoted and approved in 1916.³ This with the cases cited are the leading cases, but they have been again and again followed. The case of the *East Pant Du Mining Co.* is particularly instructive. In the first instance an action was brought in the name of the company to set aside an agreement alleged to have been procured through a fraud upon the company practised by some of the directors, but upon it appearing that a majority of the shareholders (including those whose conduct was impugned) disapproved of the action it was stayed.⁴ Thereupon another action was commenced by one of the minority in his own name, "suing on behalf of himself and all other the aggrieved shareholders," and the company was made a defendant, and it was held that this action would lie,⁵ the Court laying down the rule that where justice cannot be done in any other manner this form of action will be allowed to proceed.⁶ It is, however, essential in such a case that the plaintiff should

¹ [1874] 9 Ch. 350.

² [1876] 1 Ch. D. 13, 25.

³ See *Cook v. Deeks*, [1916] 1 App. Ca. 554; *Foster v. Foster*, [1916] 1 Ch. at page 547.

⁴ *East Pant Du Mining Co. v. Merryweather*, [1904] 2 H. & M. 231.

⁵ *Atwood v. Merryweather*, [1908] 5 Eq. 464 note.

⁶ See also *Russell v. Wakefield Waterworks Co.*, [1875] 20 Eq. 482, per Jessel, M.R.

show that he has exhausted all reasonable means of obtaining the institution of an action by the company before commencing proceedings himself¹; but for this purpose it will be enough to show that the persons of whose wrongful conduct he complains either control a majority of the votes in the company or are sufficient to turn the scale in the voting.²

An instructive comparison is to be found in cases where an act is authorised by the votes of interested directors given at a general meeting. In the absence of fraud or oppression such votes in general meeting are valid, and a minority suing to set aside the transaction will fail³; but if the directors are seeking to appropriate to themselves property which belongs to the company as a whole, not even a resolution of the company in general meeting carried by their votes can validate the transaction, and a single shareholder or a minority of shareholders can obtain relief.⁴

If a shareholder has participated in an act which is *ultra vires* he will not be allowed to bring an action for restitution⁵; but complicity in such an act will not prevent him from obtaining an injunction against a repetition of a future illegal or *ultra vires* act.⁶

A single shareholder may also sue in his own name to restrain an act which is irregular only if it constitutes an infringement of his individual rights, e.g. a wrongful refusal to accept his vote at a general meeting of the company⁷ or a wrongful exclusion of him from the board of directors.⁸ But even in this case, if the company by resolution refuses to allow the director to serve, the Court will not force him upon the company, but will leave him to his remedy in damages.⁹

In a winding up, moreover, a special right is given by Section 215 of The Companies Act to any creditor or contributory to proceed by way of misfeasance summons to obtain redress for wrongs done to the company by promoters, directors, liquidators, or other officers of the company (see page 581 *et seq.*)

¹ *Morris v. Morris*, [1877] W. N. 6, and cases in next note.

² *Atwood v. Merryweather*, [1808] 5 Eq. 404, note; *Duckett v. Gover*, [1877] 6 Ch. D. 82, and 25 W. R. 554; *Mason v. Harris*, [1878] 11 Ch. D. 97; *Alexander v. Automatic Telephone Co.*, [1900] 2 Ch. 56; *Russell v. Wakefield Waterworks Co.*, [1875] 20 Eq. 474.

³ *North-West Transportation Co. v. Beatty*, [1887] 12 App. Ch. 589; *Burland v. Earle*, [1902] App. Ch. 82.

⁴ *Cook v. Deeks*, [1916] 1 App. Ch. 551; *Menier v. Hoopers Telegraph Co.*, [1874] 9 Ch. 350.

⁵ *Towers v. African Tug Co.*, [1904] 1 Ch. 554.

⁶ *Moseley v. Koffeyfontein Mines, Limited*, [1911] 1 Ch. 72. A case of an issue of capital made without complying with the provisions of the Articles.

⁷ *Pender v. Lushington*, [1877] 6 Ch. D. 70, 81.

⁸ *Pulbrook v. Richmond Consolidated Co.*, [1878] 9 Ch. D. 610; *Harben v. Phillips*, [1883] 23 Ch. D. 14.

⁹ *Bainbridge v. Smith*, [1889] 41 Ch. D. 462, 474.

The rules discussed above may be summarised thus¹:—

1. In any proceeding brought to redress a wrong done to the corporation, or to recover property of the corporation, or to enforce rights of the corporation, the corporation is the only proper plaintiff.
2. The name of the corporation as plaintiff can only be used with the sanction of the directors or of a majority of the shareholders.
3. But Rule 1 does not apply if the action is to restrain the corporation or its directors from doing an act or acting upon a resolution which is illegal or criminal or *ultra vires* the corporation. In such a case one or more shareholders may sue "on behalf of themselves and all others &c.," but the corporation must be made a defendant.
4. There is also an exception to Rule 1, viz. although the act be not illegal or *ultra vires* and be a wrong to the corporation, yet if the alleged wrongdoers be themselves a majority or turn the scale in voting, then one or more shareholders may bring an action on behalf of themselves and others to obtain relief, but must make the corporation a defendant.
5. If the complaining shareholders believe that a majority will support them, and an urgent case exists for immediate relief, they may use the corporation's name as plaintiff and obtain an interim injunction at the peril, however, of having to pay the costs of both corporation and defendants if it proves that they have not the support of the majority.
6. A shareholder may also sue in his own name if his individual rights are infringed, although the case otherwise falls within Rule 1.
7. These rules being rules of procedure, should a case arise where justice cannot be done without allowing an action to be brought otherwise than in the name of the corporation,² a further exception would be made, but to the present all the cases fall within one, or other of these rules.

When the company is improperly made a plaintiff the proper course is to proceed by way of motion to strike out the company's

¹ See *Buckley on Companies*, 8th edition, page 612, where the rules are given in a different order but substantially to the same effect.

² See *per Jessel, M.R.*, in *Russell v. Wakefield Waterworks*, [1875] 20 Eq. 482; and *Atwood v. Merryweather*, [1808] 5 Eq. 404, note.

name, and if it is intended to ask that the solicitor purporting to act for the company should pay the costs he should be added as a respondent to the motion. Such a motion may be made on behalf of the company whose name has been wrongfully used, or of the defendants. It was at one time said that the objection that the plaintiff's name was being improperly used could only be taken by such a motion, and could not be raised by the pleadings or taken at the trial,¹ but it has been held in the House of Lords that when the Court becomes aware in the course of an action that it has been brought without the authority of the plaintiff named on the record, the action ought to be struck out and any orders made in the course of it discharged.²

Upon the question of the liability of the solicitor for costs of an action wrongfully brought in the name of a plaintiff there are a number of cases.³

OFFICERS OF A COMPANY.

There are no officers whose functions are defined by the Acts, and a company can appoint what person it pleases to whatever office it considers necessary. The officers must take their orders from the directors, and, as a rule, their functions are also determined by the directors. Unless an officer has a contract with the company fixing the terms of his employment, he can be dismissed by the directors with whatever notice to which he would be entitled if employed by a private person.

A statement in the Articles of Association that a particular man is or shall be the secretary, manager, or other officer is not a contract with him,⁴ and each officer should protect himself by seeing that his appointment is duly made by a resolution of the board of directors or by an agreement executed by the company after its incorporation.

An appointment for more than a year, or for a year to commence from a future day, cannot be enforced unless there is a sufficient memorandum to satisfy the Statute of Frauds: *i.e.* one signed by the company or by a person authorised by

¹ *Richmond v. Branson & Sons*, [1914] 1 Ch. 908.

² *Damler Co. v. Continental Tyre Co.*, [1916] 2 App. Ca. 307. In this case the secretary, having no such authority, had instructed a solicitor to commence proceedings in the company's name. No order was made as to costs as neither the secretary nor the solicitor was before the Court.

³ *Newbaggins Gas Co. v. Armstrong*, 13 Ch. D. 310; *John Morley Building Co. v. Barras*, [1891] 2 Ch. 394; *La Campagne de Mayville v. Whitley*, [1890] 1 Ch. 804; *Fricker v. Van Grutten*, [1896] 2 Ch. 649; *Gerlanger v. Gibbs*, [1897] 1 Ch. 479; *Salton v. New Beeston Co.*, [1900] 1 Ch. 43; in the last case the company had been dissolved.

⁴ *Eley v. Positive Government Assurance Co.*, [1876] 1 Ex. D. 20, 88; *Browne v. La Trinidad*, [1888] 37 Ch. D. 1.

the company, setting out the terms of the employment.¹ The Articles of Association are not a sufficient memorandum for this purpose,² but a minute of the directors signed by the chairman has been held to suffice.³ The memorandum must set out all the terms: *e.g.* the date from which the employment is to commence and the duties to be performed: otherwise the contract will not be enforceable.⁴ An offer of employment in writing, accepted by a letter agreeing to start at once, is, however, a sufficient memorandum.⁵

The Manager or Managing Director.

A company whose business has many details to be attended to requires a manager with considerable powers. He may either be one of the directors appointed to act as managing director or be actually appointed as the manager, and such powers may be delegated to him as the Articles allow, or, if they are silent, such as in a similar business would usually be entrusted to a manager. His salary may be either a fixed amount, or a commission upon profits, or a combination of both. If the commission is on "net profits" or "profits earned by the company" this means the excess of the receipts of the year over the current expenses and outgoings for that year, *i.e.* the fund which but for such commission might lawfully for that year be applied in payment of dividend, and any liability for excess profits duty for that year must be deducted in arriving at the "net profits."⁶

The general rule is that the directors cannot appoint one of themselves to an office of profit or delegate powers to a managing director unless expressly empowered by the Articles or by a resolution of the company.⁷ It is, therefore usual to insert in the Articles power for the directors to appoint one or more of their body to be managing director or directors, and to pay him or them special remuneration, delegating to him or them such powers as are necessary.⁸ Such provisions as these

¹ *Britann v. Rossiter*, [1883] 11 Q. B. D. 123.

² *Eley v. Positive Government Assurance Co.*, [1876] 1 Ex. D. at pages 29 and 30.

³ *Jones v. Victoria Graving Dock*, [1877] 2 Q. B. D. 314.

⁴ *Alexander's Timber Co.*, [1901] 70 L. J. Ch. 767.

⁵ *Curtis v. B. U. R. T. Co.*, [1912] 28 T. L. R. 353.

⁶ *Patent Castings Syndicate v. Edmerington*, [1919] 2 Ch. 254; *Vulcan Motor and Engineering Co. v. Hampson*, [1921] 3 K. B. 507.

⁷ *Boschock Proprietary Co. v. Fuko*, [1906] 1 Ch. at page 159; *Nelson v. James Nelson & Sons*, [1914] 2 K. B. at page 779. The appointment of a managing director without salary is, however, not objectionable if power to delegate exists (*Foster v. Foster*, [1916] 1 Ch. 532).

⁸ There was no such power in the original Table A, but it is conferred by Clause 72 of the new Table A.

are valid, and a person dealing with a company through its manager or managing director may assume that the usual and proper powers for carrying on the business have been delegated to him, and, although it may turn out that there has been no express delegation, the contracts made by him with a stranger will be binding.¹ But unless power is given to directors to delegate their powers they cannot do so, and must themselves do all acts except such as are usually done by servants or agents.

If the Articles empower the directors to appoint one of their body to be managing director they may appoint a person director and managing director; but if the Articles declare that any person appointed director shall retire at the next annual meeting, this will apply to the managing director, who if not re-appointed by the company will lose his office of managing director, although expressed to be appointed for a term of years.² The common power in the Articles for the directors to appoint a managing director for such term as they think fit and to revoke the appointment must be read as a power to revoke in cases where the company could do so, and will not enable the directors to remove a managing director appointed for a term of years who has complied with his part of the bargain,³ but an appointment made without specifying the period for which it is made may be determined at any time, and must not be taken as being for the period that the director appointed remains a director.⁴

If the Articles give the power of appointing a managing director to the Board, the company in general meeting cannot make the appointment⁵ unless the directors are unable or unwilling to act in the matter, in which case the company can make the appointment.⁶

A manager is an agent of the company, and must not accept commissions or presents from persons having dealings with the company. If he do so, he may be dismissed without notice, and be called upon to pay over to the company the amount received.⁷

A manager cannot be convicted under The Sale of Food Act, 1875, for an offence committed by another servant of the company, for the manager is not in the position of master to him.⁸

¹ *Biggerstaff v. Rowatt's Wharf*, [1896] 2 Ch. 93.

² *Blunt v. Stutchbury's, Limited*, [1908] 21 Times L. R. 469.

³ *Nelson v. James Nelson & Sons*, [1914] 2 K. B. 770, but if the Article is in the form of Clause 72 of Table A the directors cannot make an agreement which will prevent the company in general meeting from dismissing the managing director (*per* Swinfen Eady, J., at page 770).

⁴ *Foster v. Foster*, [1916] 1 Ch. 532.

⁵ *Thomas Logan, Limited, v. Davis*, [1911] 104 L. T. 914.

⁶ *Barron v. Potter*, [1914] 1 Ch. 895; *Foster v. Foster*, [1916] 1 Ch. 532.

⁷ See page 324 *et seq.*, *supra*.

⁸ *Booth v. Helliwell*, [1914] 3 K. B. 252.

A managing director is not a clerk or servant within the meaning of Sections 107 and 209 (Preferential Payments in Bankruptcy), so as to be entitled to payment of salary in preference to other creditors.¹

The Secretary.

The secretary of a company is the agent through whom the clerical work of the company is done. He must obey the orders of the directors, and give effect to their resolutions by issuing notices, sending circulars, writing letters, &c. He will also prepare the agenda for directors' meetings and general meetings of the company, and usually write up the minutes, either from his own notes or from those of the chairman. He will conduct the ordinary correspondence of the company and answer inquiries, or direct clerks to do so.

Although a secretary must obey orders, he clearly must not do that which he knows to be a wrong to or a fraud upon other persons. If he knowingly take part in the issue of a fraudulent prospectus he will be personally liable.

A secretary will become personally liable if he omit the word "Limited" from the name of the company upon any bill of exchange, promissory note, cheque, or order for money or goods, unless the company pay the amount.²

The duty of the secretary includes certifying transfers (see page 218, *supra*) in the ordinary course, and receiving and registering, when necessary, notices on behalf of the company; but where the same man is secretary to two companies knowledge acquired by him for one company is not notice to the other.³ Nor is notice received by a secretary or other officer not in the course of the company's business, or under such circumstances that it is not his duty to communicate it to the company.⁴ It is not part of his duty to answer inquiries about moneys owing from the company to persons with whom it has dealings, or to make representations on behalf of the company in any matters except those things which fall directly within the scope of the business of the company.

The distinction between what is and what is not the duty of the secretary is important; for any person relying upon a representation made by the secretary within the scope of his duty can look to the company to make good the representation; but

¹ *Newspaper Proprietary Syndicate*, [1900] 2 Ch. 340.

² *Penrose v. Martyn*, [1858] K. B. & E. 400; see also page 16, *supra*.

³ *Fenwick, Stobart & Co.*, [1902] 1 Ch. 507.

⁴ *Société Générale v. Walker*, [1885] 14 Q. B. D. 424, [1886] 11 App. Ca. 20.

when the representation is made by the secretary outside the scope of his duty the company will not be responsible, and only the secretary personally can be sued. This is also the case if the secretary make a representation which might have been within his duty, but which was in fact made for his own purposes, and neither intended to result nor in fact resulting in benefit to his employer.¹

The law on this point has suffered considerable modification by a decision of the House of Lords in July, 1912.² Prior to that time a judgment of Willes, J., in 1867, was deemed the leading authority, and was adopted in the Court of Appeal³ in 1904 in the following words:—"The general rule governing the responsibility of a master for the acts of his servant was stated by the late Willes, J., in *Barwick v. English Joint Stock Bank*.⁴ The passage has been frequently cited and approved, and runs as follows:—"The master is answerable for every such wrong of the servant or agent as is committed in the course of the service *and for the master's benefit*, though no express command or privity of the master be proved."⁵ He then gives instances where this rule has been acted on, and proceeds: 'In all these cases it may be said, as it was said here, that the master had not authorised the act. It is true he had not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for 'e manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in.' Founding themselves on the principle so stated, the Court of Appeal in *British Mutual Co. v. Charnwood Forest Railway Co.*⁶ held that an action of deceit would not lie against a principal for a fraudulent misstatement made by his servant for his own private purposes in reply to a class of question which it was within his ordinary duty to answer. The fact that it was made, not in the supposed interest of the master, but for his own private purposes, *ipso facto* took it out of the scope of the actual authority. . . .

¹ See and compare *Bishop v. Balkis Consolidated Co.*, [1890] 25 Q. B. D. 512; *Swift v. Jewsbury*, [1874] L. R. 9 Q. B. 301, *British Mutual Banking Co. v. Charnwood Forest Railway Co.*, [1886] 18 Q. B. D. 714, *Barnett v. South London Tramway Co.*, [1880] 18 Q. B. D. 815; *Barwick v. English Joint Stock Bank*, [1867] L. R. 2 Ex. 259. As to a case of fraud in certifying transfers see *George Whitechurch v. Cavanagh*, [1902] App. Ca. 117.

² *Lloyd v. Grace Smith & Co.*, [1912] App. Ca. 710.

³ *Ruben v. Great Fingull Consolidated*, [1904] 2 K. B. 712 (see particularly page 725); affirmed in the House of Lords, [1906] App. Ca. 439.

⁴ [1867] L. R. 2 Ex. 259.

⁵ This passage was also cited with approval by Lord Davey in the House of Lords, [1906] App. Ca. page 446; but so far as regards the words "for his master's benefit" is dissented from by the judgment of the House of Lords in *Lloyd v. Grace Smith & Co.*, [1912] App. Ca. 716.

⁶ [1886] 18 Q. B. D. 714.

In *Thorn v. Heard*,¹ Kay, L. J., refers to the case in these terms: 'It was deliberately decided that the words *for the master's benefit* are essential, and that where an agent in the course of his employment committed a fraud, not for his principal's benefit, but for the benefit of himself, and the principal did not benefit by such fraud, he could not be made liable for it. It is obvious that the ostensible authority (of the agent) may be larger than the actual, but the question will still remain whether it can ever be large enough to make the master responsible for a fraud or crime committed exclusively for the servant's own purposes, and not utilised in any way for the master.'"

Accordingly the Court held that the Great Fingall Company was not responsible for a share certificate to which the secretary had for his own fraudulent purposes wrongfully affixed the company's seal and forged the directors' signatures. Stirling, L. J., concurred, and called attention to the fact² that, although strangers might not be affected by irregularities, forgery stood on a different footing, and a forged document is wholly null and void. The House of Lords affirmed this decision, Lord Davey adopting the same view as the Court of Appeal, but Lord Loreburn and Lord Macnaghten putting their decision rather on the ground that a forgery gave no rights. The House did not discuss the cases at length.³

In *Lloyd v. Grace Smith & Co.*,⁴ however, the House of Lords held that the language of Willes, J., had been misunderstood, and that *Barwick v. English Joint Stock Bank*⁵ is not an authority for the proposition that a master is not liable for the wrong of his servant or agent committed in the course of the latter's service if it were not committed for the master's benefit. The true principle is that a master is liable for the act of his servant in the course of his master's business, whether the servant was acting for his master's benefit or not.

The first-named case was one in which the managing clerk of a solicitor in the course of legal work entrusted to him on behalf of his master misappropriated the property involved.

It had previously been held that an act not wrongful in itself done by an agent within the scope of his authority binds his principal, even where the motive was wrongful and with a view

¹ [1804] 1 Ch. at page 611.

² [1904] 2 K. B. at page 729, citing *Mahoney v. East Holyford Mining Co.*, [1874] L. R. 7 H. L. 869, and Lord Hatherley's judgment therein at page 890.

³ [1906] App. Ca. 439.

⁴ *Lloyd v. Grace Smith & Co.*, [1912] App. Ca. 716.

⁵ [1867] L. R. 2 Ex. 250.

to the private advantage of the agent, provided the other party has no knowledge of the wrong and acts in good faith.¹

Where a secretary forged directors' signatures to a cheque which was paid by the bank the company was held to be entitled to repudiate the cheque and recover the amount from the bank.²

By Lord Tenterden's Act (9 Geo. IV., Ch. 14, Section 6) a representation as to the credit of a person made by an agent does not render his principal liable, and this protects a company as well as any other principal.³ An agent making fraudulent and deceitful misrepresentations will of course come under a personal liability for his wrongful acts.

As a servant or agent of the company the secretary is under the same obligation as any other servant or agent not to accept commissions or bribes from persons having dealings with his employers, and he should carefully avoid accepting presents or bonuses from the promoters. If he do so he can be compelled to account for them to the company.⁴

The Articles of Association frequently prescribe that the secretary shall countersign deeds sealed by the company⁵ and cheques drawn on its behalf. Even where not obligatory, this is an advisable course to adopt.

As any contract which if made between private persons would not require to be under seal may be made on behalf of the company by any person acting under the express or implied authority of the company, it will frequently happen that the manager or secretary has power to contract for the company; but whether he has this power or not will be a question of fact in each case. If the Articles direct that any parts of the business must be done by the directors only, it will be obvious that these cannot be delegated; but if delegation is possible, the questions will be—(1) Has any such delegation been expressly made? and (2) if none has been expressly made, Has the course of business been such as to give an implied authority? The answers must depend upon the facts of each case.

The secretary is one of the officers liable to penalties for not making proper Returns of Allotments and for not filing the Contracts for the issue of fully paid shares (Section 88). He is

¹ *Hambro v. Burnand*, [1904] 2 K. B. 10; *Bryant v. Quebec Bank*, [1893] App. Ca. 170.

² *Kepitigalla Rubber Estates v. National Bank of India*, [1909] 2 K. B. 1010. The fact that the pass book showed the forged cheques is no protection to the bank where the directors did not examine it.

³ *Hirst v. West Riding Union Banking Co.*, [1901] 2 K. B. 560.

⁴ *McKay's Case*, [1876] 2 Ch. D. 1; *De Ruviigne's Case*, [1877] 5 Ch. D. 306; see also page 324, *supra*.

⁵ Clause 76 of the new Table A is to this effect.

named in Section 99, Sub-section 1, as one of those liable to penalties for not registering mortgages or charges required to be registered, and would be included in the words "and other officer" in Sub-section 2 and in the words "any person" in Sub-section 3. Under the words "any person" in Section 281 he is criminally responsible for wilfully making a statement false in any material particular "in any return, report, certificate, balance sheet, or other document required by or for the purposes of any of the provisions of this Act." He is also one of the persons who may make a statutory declaration that the prescribed conditions for commencing business have been complied with (Section 87).

The secretary is one of the officers of the company liable to be examined in a winding up, either under Section 174 (private examination) or under Section 175 (public examination), and, if a delinquent, he may be rendered liable under Section 215 (misfeasance).

A secretary may be a "clerk or servant" entitled to the benefit of the Preferential Payments in Bankruptcy Act (Sections 107 and 209); but a secretary who does not give his whole time to the company, but performs his duties by deputy, is not within those sections.¹

The Solicitor.

Before the incorporation of the company a statutory declaration of compliance with the requirements of the Act must be filed "by a solicitor of the High Court, and in Scotland by an enrolled law agent, engaged in the formation of the company, or by a person named in the Articles as a director or secretary of the company" (Section 17, Sub-section 2). This, therefore, so far as the company is concerned, is the first appearance of a solicitor; but it will not bind the company to employ or pay him.

A company usually appoints a solicitor, often nominating him in the Articles of Association; but the fact of being so named does not create a contract with the solicitor so as to give him a right to damages if the company refuse to employ him²; nor does a statement in the Articles that the company shall pay the preliminary expenses of forming the company give the promoters or solicitors any right to be paid expenses they have incurred or costs which have accrued.³ It follows, therefore, that if a solicitor wishes to be secure of receiving his costs incurred about

¹ *Cairney v. Back*, [1906] 2 K. B. 746.

² *Eley v. Positive Government Assurance Co.*, [1870] 1 Ex. D. 20, 88; *Browne v. La Trinidad*, [1888] 37 Ch. D. 1.

³ *English and Colonial Produce Co.*, [1906] 2 Ch. 435; *Hereford and South Wales Wagon Co.*, [1876] 2 Ch. D. 621; see also page 164, *supra*.

the formation of a company, he must either have a retainer from the promoter and get payment from him, or see that a definite contract is made with him by the company after its incorporation.

When a person is appointed solicitor to a company he naturally acts for the company in most of its affairs; but the company is at liberty to employ any other person or firm for any business unless there is an agreement that it will exclusively employ a specified person or firm.

The company is in the same relation as any other client to a solicitor, and in suing to recover his bill of costs the retainer must be proved. The solicitor has, moreover, the same lien for costs that he would have against any other client, including a lien on funds recovered through his instrumentality before or during a winding up, or partly before and partly during the winding up, and may obtain a charging order for these after the winding up.¹ If, to establish his retainer, he has in the winding up to resort to a summons, his lien on the moneys recovered extends to the costs of such summons²; but the lien of the solicitor is subject to the Companies Acts and the Articles of Association, and cannot be asserted so as to prevent documents being dealt with in the manner required thereby, nor so as to hinder the prosecution of a winding up. Therefore the lien will not attach to books which ought to be kept at the company's office,³ or to the file of proceedings in or documents relating to the winding up.⁴ The liquidation does not destroy a solicitor's pre-existing lien on the company's documents, but he will be ordered to deliver to the liquidator (subject to his lien) documents coming to his hands in the liquidation.⁵ And a solicitor may be compelled to produce documents on which he has a lien in an examination under Section 174.⁶ The lien will not attach to documents received after the winding up by a solicitor who has been employed by the company before the winding up.⁶

A solicitor employed by the trustees for debenture holders to approve the trust deed has a lien on that deed, although the costs were incurred before its execution.⁷ He will, however, have

¹ *Re Born*, [1900] 2 Ch. 433; *re Massey*, [1870] 9 Eq. 367, *re Meter Cabs, Limited*, [1911] 2 Ch. 557.

² *Re Hull*, [1896] 33 Ch. D. 260. *re Meter Cabs, Limited*, [1911] 2 Ch. 557.

³ *Re Anglo-Maltese Hydraulic Co.*, [1895] 54 L. J. Ch. 730.

⁴ *Ex parte Pullbrook*, [1869] 4 Ch. 627.

⁵ *Re Rapid Road Transit Co.*, [1900] 1 Ch. 96, where the cases as to lien are discussed.

⁶ *Re Capital Fire Insurance Association*, [1883] 21 Ch. D. 408.

⁷ *Wright v. Deo Estates, Limited*, [1911] 2 Ch. 85.

no such lien if he has agreed to look to the company alone for payment,¹ or if he acts for all parties, for then he cannot deny that he holds the deeds for the mortgagee.²

A lien accrued before the issue of debentures, or while the debentures continue to be a floating security, has priority over the rights of the debenture holders.³

Where money has been paid to a solicitor for future costs, and a receiver is appointed, the solicitor may retain the amount due for costs incurred before the appointment of the receiver, but must hand over the balance.⁴

The solicitor advises the company in all matters where his advice is asked, and in large companies he frequently attends board meetings, and is present to advise the directors at general meetings. It must be remembered, however, that the solicitor has no authority, and is only an adviser, whose advice may be accepted or rejected.

In questions as to increasing or reducing the capital, issuing new shares or debentures, forfeiting shares, passing resolutions for winding up, or undertaking any scheme for amalgamation with other companies, it is most desirable that advice should be had before even the preliminary steps are undertaken, as mistakes may easily be made, which almost always involve considerable expense, and which sometimes cannot afterwards be rectified: as,* for instance, where a company, having passed resolutions for winding up with a view to reconstruction, found that, although the scheme for reconstruction could not be carried out, the company was in liquidation.⁵

When a winding up is commenced the position of the solicitor is somewhat different. A retainer by the company is no longer sufficient and a new retainer by the liquidator is required.

As to the solicitor's right in a winding up to costs incurred before the winding up, and to taxation of such costs, see page 603, *infra*.

By Section 151 in England, but not in Scotland or Ireland, the sanction either of the Court⁶ or of the committee of inspection is necessary for the appointment of a solicitor in a compulsory

¹ *Re* Mason and Taylor, [1878] 10 Ch. D. 729.

² *Re* Snell, [1877] 6 Ch. D. 105.

³ *Brunton v. Electrical Engineering Corporation*, [1892] 1 Ch. 434.

⁴ *Pearce v. British Tea Table Co.*, [1910] 101 L. T. 707.

⁵ *Thomson v. Henderson's Transvaal Estates*, [1908] 1 Ch. 765; *ex parte* Fox, [1871] 6 Ch. 187; *Cleve v. Financial Corporation*, [1874] 16 Eq. 363.

⁶ Where a liquidator, knowing that the committee disapproved of the appointment of a particular solicitor, applied *ex parte* and obtained the Court's sanction to his appointment, the Court, on an application by the committee, set the Order aside with costs against the liquidator (*Consolidated Diesel Engine Co.*, [1915] 1 Ch. 192).

winding up, and must be obtained before the employment, except in cases of urgency. In such cases it must be shown that there was no undue delay in obtaining the sanction. Solicitors should see that this necessary preliminary is complied with, or they will lose their right to costs, and they should note that the liquidator's authority is only to employ a solicitor to take any proceedings or do any business which the liquidator is himself unable to take or to do. In a voluntary winding up these rules do not apply. If the liquidation, whether voluntary or compulsory, is commenced within a year after the delivery of the bill of costs, the bill is liable to be taxed at any time before payment, even though more than a year has elapsed since its delivery.¹

The solicitor's right is only to be paid his costs out of the assets of the company, and the liquidator is not personally liable for the costs of the winding up²; but the solicitor will have a lien for his costs on any moneys which may be recovered before or during the winding up through his instrumentality,³ and, as the costs of the winding up take priority over other claims, he will be entitled to be paid before the unsecured creditors of the company receive any dividend.

A solicitor is not an officer of the company within Section 215, so as to be liable to the summary process therein provided for the assessment of damages against delinquent directors and officers,⁴ unless he is also a promoter of the company, or⁵ by reason of the manner of his employment it appears that his position is more than that of solicitor,⁵ when he will be liable on this distinct ground.

A person is not a promoter within the meaning of Section 84 (Directors' Liability) by reason of his acting in a professional capacity for persons engaged in the promotion, but he may by doing other acts have become a promoter.⁶

A solicitor's authority to represent the company is determined by its dissolution, and if he continues to act after the dissolution,⁷ or purports to act for a company not in fact incorporated,⁸ he will be liable to the other party for any costs incurred by reason of his so doing.

¹ *Foss, Bilborough & Co.*, [1912] 2 Ch. 161; *Marseilles Extension Railway Co., ex parte Evans*, [1871] 11 Eq. 151.

² *Ex parte Watkin*, [1876] 1 Ch. D. 130.

³ *Re Massey*, [1870] 9 Eq. 367; *Meter Cabs, Limited*, [1911] 2 Ch. 557.

⁴ *Carter's Case*, [1886] 31 Ch. D. 406.

⁵ *Re Laborator Permanent Benefit Building Society*, [1894] 71 L. T. 406.

⁶ See Section 84 and *re Turner*, [1884] 53 L. J. Ch. 42, 40 L. T. 20, and note⁵.

⁷ *Salton v. New Beeston Cycle Co. No. 2*, [1900] 1 Ch. 43.

⁸ *Simmons v. Liberal Opinion, Limited*, [1911] 1 K. B. 906.

The Auditors.

Prior to 1900 there were no statutory provisions in regard to auditors, except in the case of banks, which were subject to Section 7 of the Act of 1879¹; but the Acts of 1900 and 1907 and Section 112 of 1908 remedy this omission.

Every company must at each annual general meeting appoint an auditor or auditors to hold office until the next annual general meeting, and if none be appointed the Board of Trade may, on the application of any member of the company, appoint an auditor for the current year and fix his remuneration (Section 112, Sub-sections 1 and 2). The directors may, however, before the statutory meeting appoint the first auditors, to hold office until the first annual general meeting, unless previously removed by a resolution of the shareholders in general meeting, in which case the shareholders at such meeting may appoint auditors (Sub-section 5). The directors may also fill any casual vacancy in the office of auditor; but while the casual vacancy continues the surviving or continuing auditor or auditors (if any) may act (Sub-section 6).

There is no provision in the Act for the removal of an auditor once appointed; but where auditors had neglected their duties by which it was alleged that loss had occurred, and the directors, having called in chartered accountants, refused to allow the old auditors to proceed with the current audit or have access to the books, the Court refused, on an interlocutory application, to compel the directors to do so. "The Court," said Farwell, L. J., "will not force on an unwilling company auditors whom they do not approve."²

It having been suggested that on some occasions an auditor who had been inconveniently faithful to his duties had been quietly displaced at the next annual meeting without notice to the shareholders, Sub-section 4 of Section 112 provides that no person, other than a retiring auditor, shall be appointed at an annual general meeting unless a shareholder has given notice to the company, not less than fourteen days before the annual general meeting, of his intention to nominate him. The company must send a copy of the notice to the retiring auditor, and give notice to the shareholders, either by advertisement or in any manner allowed by the Articles, not less than seven days before the meeting; but if the meeting is not called until after the notice of intention to nominate a new auditor, the notice to the

¹ Repealed, except as to one proviso, by Schedule 3 of the Act of 1907.

² *Cuff v. London and County Land Co.*, [1912] 1 Ch. 440.

shareholders may be given with the notice calling the meeting, and it will be no objection that the limits of time above mentioned are not observed.

A director or officer of the company is not capable of being appointed auditor (Sub-section 3).

The remuneration of the auditors must be fixed by the company in general meeting, except that the remuneration of any auditors appointed before the statutory meeting, or to fill any casual vacancy, may be fixed by the directors (Sub-section 7).

The duties of the auditors are stated in Section 113. Every auditor has at all times a right of access to the books and accounts and vouchers of the company, and may require from the directors and officers all necessary information and explanations.¹

The Act of 1900 required a certificate that the auditors' requirements had been complied with, and a report on the accounts. These are now blended in one report. As expressed in Section 113, Sub-section 2, the auditors must make a report to the shareholders on the accounts examined by them, and on every balance sheet laid before the company in general meeting, stating (a) whether they have obtained all the information and explanations they have required, and (b) whether the balance sheet² is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs "*according to the best of their information and the explanations given to them, and as shown by the books of the company*" The words in italics were not to be found in the Act of 1900, but are clearly desirable, and auditors of repute have always acted as if they were already part of the law.

The balance sheet must be signed by two directors, or by the sole director if there is only one, and the auditors' report must be attached thereto, or a reference to it inserted at the foot of the balance sheet. The report must be read before the company in general meeting, and be open to inspection by any shareholder,³ who is also entitled to be furnished with a copy of the balance sheet and auditors' report at a charge not exceeding sixpence for every hundred words (Section 113, Sub-section 3).

¹ This is not a private right which the auditors can enforce in their own interests. For a case where access was refused on the ground that the auditors had neglected their duty see note ² on previous page.

² Note that the Act does not require any report upon the profit and loss account, but as the balance of profit or loss is carried into the balance sheet this will not usually excuse the auditors from dealing with the question of the profit or loss shown, and they are bound to report generally on the accounts.

³ This would seem to include preference shareholders of a private company, although Section 114 does not apply to them.

As to other matters affecting the balance sheet see Chapter V., page 396, *infra*.

Holders of preference shares and debentures in companies other than private companies or companies registered before the 1st July, 1908, are, by Section 114, given the same right to receive and inspect the balance sheets of the company and the reports of the auditors and other reports as is possessed by holders of ordinary shares of the company.

By Sub-section 4 of Section 113, if any copy of a balance sheet is issued, circulated, or published, not having been signed as required by the section, or without either a copy of the auditors' report attached or containing the required reference to such report, the company, and every director, manager, secretary, or other officer of the company knowingly a party to the default, is liable to a fine not exceeding fifty pounds. The requirements of the section relate to every balance sheet "laid before the company in general meeting," and, presumably, the penalties will not attach in respect of other balance sheets.

It is not enough, however, for the auditors merely to report that the balance sheet does *not* exhibit a true view of the accounts. They must report generally on the state of the accounts. "Their duty is to call attention to that which is wrong."¹

These provisions are general, and apply to all companies. They will therefore supersede any regulations of the company not in accord with them. Any Article or special resolution requiring the auditors not to disclose facts (*e.g.* in relation to a secret reserve fund) which they may consider it their duty to include in their report is unlawful and invalid.¹

In the case of a Banking Company registered after the 15th August, 1879, if the company has branch banks beyond the limits of Europe, it suffices if the auditor has access to such copies of or extracts from the books and accounts as are transmitted to the head office, but the balance sheet must be signed by the secretary or manager and at least three directors if there are so many (Section 113, Sub-section 5).

The "statement in the form of a balance sheet" which every public company is required by Section 26, Sub-section 3, to file is to be "audited by the company's auditors"; but there are no provisions as to the making or filing of any report on such statement by the auditors (see page 398, *infra*).

"Any person" (which will include an auditor) who, "in any return, report, certificate, balance sheet, or other document required by or for the purposes" mentioned in the Fifth Schedule to

¹ *Newton v. Birmingham Small Arms Co.*, [1900] 2 Ch. 378.

the Act, "wilfully makes a statement false in any material particular, knowing it to be false," is guilty of a misdemeanour, and liable to fine or imprisonment or to both.¹

Although it is usual to appoint some firm of accountants to be the auditors, there is nothing illegal in the appointment of any other person; but in companies of any substance it is very unwise not to obtain the benefit of the advice which an experienced professional man is always ready to give, as well as his knowledge of what the balance sheet and accounts should show. A provision in the Bill of 1907 that at least one auditor of every company having a capital of £100,000 should be a professional accountant was rejected.

The auditors are essentially agents of the shareholders, and their duty is to act as a check upon the directors, and to give an assurance to the shareholders that the balance sheet and report are a *bonâ fide* and correct statement of the affairs of the company.

The auditors of a bank governed by The Companies Act, 1879,² have been held by the Court of Appeal to be officers of the company,³ as have the auditors of registered companies having Articles imposing on them duties similar to those imposed by the Act of 1879 or by Clauses 83 to 94 of the original Table A,⁴ and, as these are similar to those in the Consolidation Act, it seems Courts of First Instance and the Court of Appeal will be bound by those cases to hold that all auditors of companies are officers and liable to proceedings under Section 215.

Persons who perform the duties of auditors without being regularly appointed may become *de facto* officers of the company, and liable as such to misfeasance proceedings; but this is a question of fact, and the services of an accountant are not necessarily those of an auditor.⁵

The leading authorities concerning the duties of auditors are the cases arising in connection with the Kingston Cotton Mill and the "Liberator group" of companies. In the case of the London and General Bank (one of this group) it was held by the Court of Appeal⁶ that in the circumstances of the case the auditor of that company was liable to repay a dividend improperly declared in reliance upon a misleading certificate given by him. The judgment of Lord Lindley contained

¹ See Section 281 of the Act of 1908, and Sections 5 and 17 of The Perjury Act, 1911, and the Schedule to that Act.

² Repealed by the Act of 1907.

³ *London and General Bank*, [1895] 2 Ch. 166.

⁴ *Kingston Cotton Mill Co.*, [1896] 1 Ch. 6. This case followed the *London and General Bank* case, but the Lords Justices did not appear to be satisfied with the reasoning in the earlier case, and the House of Lords might take a different view.

⁵ *Western Counties Steam Bakeries*, [1897] 1 Ch. 617.

⁶ *London and General Bank*, [1895] 2 Ch. 673.

the following declarations of principle:—"It is no part of an auditor's duty to give advice, either to directors or shareholders, as to what they ought to do. An auditor has nothing to do with the prudence or imprudence of making loans with or without security. It is nothing to him whether the business of a company is conducted prudently or imprudently, profitably or unprofitably. It is nothing to him whether dividends are properly or improperly declared, provided he discharges his own duty to the shareholders. His business is to ascertain and state the true financial position of the company at the time of the audit, and his duty is confined to that. But then comes the question, How is he to ascertain that position? The answer is, By examining the books of the company. But he does not discharge his duty by doing this without inquiry and without taking any trouble to see that the books themselves show the company's true position. He must take reasonable care to ascertain that they do so. Unless he does this his audit will be worse than an idle farce. Assuming the books to be so kept as to show the true position of the company, the auditor has to frame a balance sheet showing that position according to the books, and to certify that the balance sheet presented is correct in that sense. . . . An auditor, however, is not bound to do more than exercise reasonable care and skill in making inquiries and investigations. He is not an insurer. . . . What is reasonable care in any particular case must depend upon the circumstances of that case. Where there is nothing to excite suspicion very little inquiry will be reasonably sufficient, and in practice I believe business men select a few cases at haphazard, see that they are right, and assume that others like them are correct also. Where suspicion is aroused more care is obviously necessary."

In the particular case in question it appeared that the auditor himself considered some of the items on the credit side very unsatisfactory, and called the attention of the directors to this fact in a special report, and strongly urged that no dividend should be paid. The directors, however, induced him to omit any reference to this in the certificate annexed to the balance sheet, and at the meeting of shareholders a dividend of seven per cent. was declared. The Court held that the auditor had failed in his duty to the shareholders, and that, the declaration of a dividend being the natural result of this failure of duty, the auditor and the directors were jointly and severally liable to repay the amount of the dividend. The dividend for the previous year had also been improperly paid, but it was not proved that the auditor "really knew, or ought then to have known, that the position of the bank was not correctly shown by the books," and he escaped liability

in respect of that year. It was also held not to be enough to insert such a vague phrase as "The value of the assets as shown is dependent upon realisation." If a warning is to be given, it must be clear. It is not enough to give the shareholders "means of obtaining information"; they must be given the necessary information itself.

Lopes, L. J., gives the following definition¹:—"It is the duty of an auditor to bring to bear on the work he has to perform that skill, care, and caution which a reasonably competent, careful, and cautious auditor would use. What is reasonable skill, care, and caution must depend on the particular circumstances of each case. An auditor is not bound to be a detective, or, as was said, to approach his work with suspicion, or with a foregone conclusion that there is something wrong. He is a watchdog, not a bloodhound. He is justified in believing tried servants of the company in whom confidence is placed by the company.² He is entitled to assume that they are honest, and to rely upon their representations, provided he takes reasonable care. If there is anything calculated to excite suspicion, he should probe it to the bottom; but in the absence of anything of that kind he is only bound to be reasonably cautious and careful. . . . It is not the duty of an auditor to take stock; he is not a stock expert; there are many matters in which he must rely on the honesty and accuracy of others. He does not guarantee the discovery of all fraud."

Farwell, L. J., has said that the business of a company's auditor "is to ascertain and state the true financial position of the company at the time of the audit and nothing more,"³ quoting Lord Lindley's judgment cited above as authority, but it is to be remembered that the auditor has to report "on the accounts examined by him" as well as on the balance sheet, and the above statement must not be pressed too far.

Although an auditor may rely upon a trusted servant of the company in regard to stocktaking, he must not accept a statement from a servant as to his own liabilities. In justifying reliance upon a manager in regard to stock, Lindley, L. J., says, "The manager had no apparent conflict between his interest and his duty. His position was not similar to that of a cashier, who has to account for the cash he receives, and whose account of his

¹ Kingston Cotton Mill Co. No. 2, [1896] 2 Ch. 288, 289. The judgments quoted above were cited and approved in *re* City Equitable Fire Insurance Co., [1924] 40 T. L. R. 853.

² Compare *Squire Cash Chemist, Limited, v. Ball*, [1911] 28 T. L. R. 81, 106 L. T. 197, the case of accountants employed by an individual to investigate a business, where Cozens-Hardy, M.R., while saying it was not their duty to take stock, added "They may well call for explanations of particular items in the stock sheets."

³ *Rex v. Roberts*, [1905] 1 K. B. at page 137.

receipts and payments could not reasonably be taken by an auditor without further inquiry."¹

It must not, however, be thought that an auditor may rely upon others for anything which it is part of his duty to examine himself.

The auditors will clearly be bound to ask for any information and explanations they require to form an opinion upon the company's position, and take into account the answers they get before they make their report, and must form their own opinion whether the balance sheet exhibits "a true and correct view of the state of the company's affairs." A balance sheet may contain no mis-statements and yet not come up to the standard.

It is the duty of auditors to make themselves familiar with the obligations imposed upon them by the Articles² and the Acts of Parliament, and if damage results to the company from the balance sheet not showing the true position of the company the onus is on the auditors of showing it was not due to their default,² but the company must show damage, and if the Court is not satisfied that if the balance sheet had disclosed the truth the shareholders would have taken action to obtain restitution the auditors will escape liability.³

Where a company is transacting business abroad, or at a number of branches throughout the United Kingdom, the only materials that the auditors at the head office have as regards much of the business are the reports from the branches and agencies, and unless anything appears to be wrong upon the face of such reports the auditors cannot check them at all. It is strange, however, that it is only in the case of banks that the Act (Section 113, Sub-section 5) expressly allows of copies and extracts only being submitted from foreign branches, and then only if the branches are outside Europe.

Again, the auditors usually know nothing of what allowance ought to be made in respect of bad or doubtful debts. This depends upon the facts of each case, and the credit and responsibility of the debtors, into which auditors usually cannot inquire. But if there are circumstances which bring to the notice of the auditors that the book debts or any other assets ought not to be treated as of their nominal value, they should require that the balance sheet shall estimate such assets at their fair value, or add a note warning the shareholders of the facts.

Again, it is not the duty of the auditors to value the freehold or leasehold property or the stock-in-trade of the company.

¹ Kingston Cotton Mill Co. No. 2, [1896] 2 Ch. at page 287.

² Kingston Cotton Mill Co. No. 2, [1896] 2 Ch. at page 284; Republic of Bolivia Syndicate, [1914] 1 Ch. 139.

³ Republic of Bolivia Syndicate, [1914] 1 Ch. 130.

But if they find that depreciation is not being written off from a wasting property, or that absurd values are placed upon existing property, or, still more, if amounts are being "written on" for supposed enhancement of value, they should require the directors either to have an independent valuation by some competent persons, or to state clearly in the balance sheet how the amounts are arrived at.

The auditors will of course see for themselves that all the securities and property represented to belong to the company actually exist, and that the proper documents of title are in the company's possession, and will not be satisfied with being shown a bundle "said to contain the proper securities."

Though it is not the duty of auditors to advise, they usually give the company the advantage of their experience in determining doubtful questions, such as what amounts may be properly carried to capital account, what divided over several years, and what charged to the current year, and they should particularly direct their attention to seeing that dividends are only paid out of profits. If the directors do not accept their opinion, the auditors must protect themselves by attaching a note to the balance sheet or profit and loss account.

It is usual for the report and balance sheet to be submitted to the auditors a sufficiently long time before the general meeting for their report or certificate to be added to the balance sheet before it is sent to the members. Under the Act of 1900 it was necessary that the certificate as to whether or not the requirements of the auditors had been complied with should be so appended to the balance sheet. Under the Act of 1908 the whole report may be a separate document, but it must in any case be read at the general meeting, and a reference to the report must be inserted at the foot of the balance sheet (Section 113, Sub-section 3). When auditors have made a report to the directors they should firmly refuse to allow it to be suppressed or to modify it, unless there is shown to be a mistake in it. .

It has been said that the auditors are agents for the shareholders, but this must not be taken to include the doctrine that notice of facts given to the auditors is notice to the shareholders, so as to prevent them from afterwards objecting to any misconduct of the directors or other persons of which the auditors had knowledge.¹

The duty of the auditors is to investigate the affairs of the company and to report to the shareholders upon them, and if any loss arises to the company from the neglect of this duty the auditors

¹ *Spackman v Evans*, [1908] L. R. 3 H. L. 171.

may be held personally liable¹; but this is not a breach of trust, and after six years the Statute of Limitations will be a good defence. And an Article exempting auditors from liability for losses not happening by or through their own wilful neglect or default is valid and effective to protect them against responsibility for negligence that is not wilful, that is, which is not accompanied by conscious breach of duty.²

Sometimes very difficult questions arise as to the proper basis on which a correct balance sheet should be made out, and as to what should properly be carried to capital and what to current account. An auditor, if a case of real difficulty arises, should protect himself by taking the opinion of counsel on the point in doubt.

The following is a form of statement which may be used by auditors to comply with the Act:—

We have examined the books and accounts of the company kept in the London office [and the reports and statements received from the agencies in the colonies], and the above balance sheet is in our opinion a full and fair balance sheet, containing the particulars required by the regulations of the company, and is properly drawn up so as to exhibit a true and correct view of the company's affairs *according to the best of our information and the explanations given to us*,³ and as shown by the books of the company. We have obtained from the directors and officers of the company all the information and explanations we have required.

If appropriate, there should be added, "and we have inspected the securities held at the head office [for the amount standing as reserve fund]."

If necessary, the auditors should add any special remarks, such as, "No depreciation has been written off plant and machinery for the year"; "The value of the stock-in-trade is certified by the Managing Director"; "The item 'Securities and Investments' includes 1000 ordinary shares of £10 each of the A. B. Company, Limited, which is in liquidation"; or, "Under the heading 'Mortgages and Loans' is included interest accrued and due, some of which is in respect of interest for years prior to 1921"; or, "At present prices the investments of the company are not of the value shown above; but this does not affect the Profit and Loss Account, where only the interest actually received is credited."

The name of the person or firm to be appointed auditor or auditors for the ensuing year, and the amount of the remuneration, should be moved and seconded by non-official shareholders (not by directors or other officers of the company) at the annual general meeting in each year.

¹ *Leeds Estate Building Society v. Shepherd*, [1887] 36 Ch. D. 787; *re London and General Bank*, [1895] 2 Ch. 166 and 673.

² *City Equitable Fire Insurance Co., re*, [1924] 40 T. J. R. 853.

³ These words are required by the Acts of 1907 and 1908.

CHAPTER II.

THE ACTS OF THE COMPANY.

GENERAL MEETINGS.

THE ordinary business of the company is transacted by the directors. The company exercises its control and does such acts as are reserved to it by the votes of a majority at general meetings. "Whenever a certain number are incorporated, a major part may do any corporate act; so if all are summoned and part appear, a major part of those that appear may do a corporate act"¹; but if the Articles prescribe a quorum, no less number of members can do business.² The assent of every member of a company given separately has not the same effect as a resolution passed at a general meeting,³ unless the company is one not inviting or proposing to invite subscription from the public⁴; and the presence of all the members of a company at a meeting is sufficient to regularise any resolution passed whether there has or has not been due notice.⁵ Cotton, L. J., said, "The Court would never allow it to be said that there was an absence of resolution when all the shareholders, and not only a majority, have *expressly* assented to that which is being done," in a case where the act is within the powers of the corporation.⁶

A single person cannot constitute a meeting⁷—a rule which has considerable importance now that a company may consist of only two persons, of whom one may be absent or ill. If, however, a class of shareholders consists of only one person (*e.g.* where one man holds all the preference shares) clauses in the Memorandum or Articles requiring the consent of a meeting of such class may be satisfied by a resolution in writing signed by that one person.⁸

The Statutory Meeting.

Under Section 49 of the Act of 1862 a company was required to hold a general meeting "once at the least in every year"; but the Act did not specify any date for the holding of the first general meeting. Section 61 of the Act of 1908 imposes the obligation to

¹ *Per* Lord Hardwicke, *Attorney-General v. Davy*, [about 1745] 2 Atk. 212, see also *per* Wills, J., *Merchants of the Staple v. Bank of England*, [1888] 21 Q. B. 165.

² See page 378, *infra*.

³ *Re* George Newman & Co., [1865] 1 Ch. 674.

⁴ *Attorney-General for Canada v. Standard Trust Co.*, [1911] App. Ct. 498; *Innes & Co.*, [1908] 2 Ch. 254, where Cozens-Hardy, L.J., held that mere knowledge and acquiescence of all the shareholders in such a company would condone a breach of trust in the directors.

⁵ *Express Engineering Works*, [1920] 1 Ch. 486.

⁶ *Baroness Wenlock v. River Dee Company*, [1883] 36 Ch. D. at page 681, note.

⁷ *Sharp v. Dawes*, [1876] 2 Q. B. D. 26; *Sanitary Carbon Co.*, [1877] W. N. 223.

⁸ *East v. Bennett Bros.*, [1911] 1 Ch. 163.

hold a general meeting "once at the least in every calendar year, and not more than fifteen months after the holding of the last preceding general meeting."¹ Section 65 provides, in the case of Companies Limited by Shares registered after the end of 1900, for the holding of a statutory meeting (see *infra*). But Companies Limited by Guarantee or Unlimited are only subject to the requirement of holding a general meeting once in every year as above mentioned.

Companies Limited by Shares must hold what is now formally called their "statutory meeting" "within a period of not less than one month nor more than three months from the date at which the company is entitled to commence business" (Section 65, Sub-section 1). This date is fixed by Section 87 in the case of a public company as the date when a statutory declaration has been filed that the minimum subscription has been allotted and that the directors have paid the application and allotment moneys payable on their shares. The Act contains no provisions for the case of a private company, and such a company is accordingly entitled to commence business as soon as it is incorporated. It should therefore hold its statutory meeting within a period of not less than a month nor more than three months from that date.

The notice convening the meeting should state that it is to be "the statutory meeting," and it seems that a meeting called by a notice not so stating will not comply with the Act.²

It is intended that at the statutory meeting the shareholders shall have an opportunity of learning how the flotation of the company has been effected, and of taking matters to some extent into their own hands. Section 65, Sub-sections 2 to 4, requires the directors of companies other than private companies,³ at least seven days before the statutory meeting, to forward to every member a report, certified by not less than two directors, or, if there are not two directors, by the sole director and manager, stating—

1. The total number of shares allotted, distinguishing those issued as fully or partly paid up otherwise than in cash, and stating the consideration for which they have been allotted.
2. The total amount of cash received by the company in respect of all the shares allotted, distinguished as aforesaid.
3. An abstract of the receipts of the company on account of its capital, whether from shares or debentures, and of the payments made thereout, up to a date within seven

¹ See page 357, *infra*, and *Smedley v. Registrar of Companies* [1919] 1 K. B. 97.

² *Gardner v. Ingle*, [1912] 1 Ch. 700.

³ Private companies are excluded by Sub-section 10.

days of the date of the report, exhibiting under distinctive headings the receipts of the company from shares and debentures and other sources, the payments made thereout, and particulars concerning the balance remaining in hand, and an account or estimate of the preliminary expenses of the company.

4. The names, addresses, and descriptions of the directors, auditors (if any), managers (if any), and secretary of the company. (This will show if there has been any change since the issue of the prospectus)
5. The particulars of any contract the modification of which is to be submitted to the meeting for its approval, together with the particulars of the modification or proposed modification¹

The statements referred to in the first three of the preceding paragraphs must be certified by the auditors (if any) to be correct (Sub-section 4).

A copy of the report must be filed with the Registrar of Companies as soon as it is sent to the members (Sub-section 5), but private companies are excluded from this provision (Sub-section 10).

If the company (not being a private company) has issued any debentures, the holders thereof are entitled to copies of the report (Section 114).

There must also be prepared and produced at the statutory meeting, and be accessible during the whole meeting, a list showing the names, descriptions, and addresses of the members of the company, and the number of shares held by them respectively (Sub-section 6).

If default is made in filing the report or holding the statutory meeting, any shareholder may, at the expiration of fourteen days after the last day on which the meeting ought to have been held, petition the Court for the winding up of the company. The Court, on the hearing of the petition, may either direct the company to be wound up, or direct the report to be filed or a meeting to be held, or make such other order as may be just, and may order the persons in default to pay the costs of the petition (Section 129; Section 65, Sub-section 9).

At the meeting a discussion may be raised on "any matter relating to the formation of the company or arising out of the report, whether previous notice has been given or not," but no

¹ A company may not prior to the statutory meeting vary the terms of a contract referred to in the prospectus, or statement in lieu of prospectus, except subject to the approval of the statutory meeting (Section 83).

resolution may be passed without such notice as the Articles of Association require (Section 65, Sub-section 7). The meeting may adjourn from time to time, and notice may be given in the interval of any resolution, and at the adjourned meeting any resolution may be passed of which notice has been given in accordance with the Articles of Association (Sub-section 8).

The provision for adjournments of meetings usually inserted in the Articles is that "The chairman, with the consent of the meeting, may adjourn," &c., in which case the meeting cannot compel the chairman to adjourn¹; but it would seem that the words of the Act in reference to the statutory meeting—viz. "The meeting may adjourn from time to time"—put the power of adjournment into the hands of the majority of the meeting, without regard to the chairman.

Subsequent General Meetings.

The company must hold a general meeting "once at the least in every calendar year, and not more than fifteen months after the holding of the last preceding general meeting"² (Section 64), and the company, and every director, manager, secretary, or other officer knowingly a party to default in complying with this regulation, is liable to a fine not exceeding fifty pounds,³ while the Court can, on the application of any shareholder when default has been made, call or direct the calling of a general meeting.⁴

This is called the "Annual General Meeting" or the "Ordinary General Meeting," and the time at which it is to be held is usually fixed by the Articles. Where there are no special Articles the old Table A provided that, "if no other time or place is prescribed, a general meeting shall be held on the first Monday in February in every year" (Clause 30), and the new Table A provides that "at such time (not being more than fifteen months after the holding of the last preceding general meeting) and place as may be prescribed by the company in general meeting, or, in default, at such time in the month following that in which the

¹ *Salsbury Gold Mining Co. v. Hathorn*, [1897] App. Ca. 208.

² It would seem that if an extraordinary general meeting has been held the section will be satisfied if the next general meeting is within fifteen months of the extraordinary general meeting, and in the next succeeding calendar year.

³ The Summary Jurisdiction Act, 1818, Section 11, requires proceedings to be taken within six months after the offence; but Section 64 creates two obligations: (1) to hold a meeting in each calendar year, and (2) to hold a meeting within fifteen months after the last preceding general meeting. An offence against the latter obligation may be complete comparatively early in the year, but an offence against the former obligation only occurs when the year has expired, and proceedings may be instituted up to the 30th June following (*Smalley v. Registrar of Companies*, [1919] 1 K. B. 97).

⁴ Apart from this statutory power the Court has no jurisdiction to direct the holding of a meeting of a company not in liquidation (*MacDougall v. Gardiner* No. 1, [1875] 10 Ch., App. Ca. 606).

anniversary of the company's incorporation occurs, and at such place, as the directors shall appoint," and, further, that "in default of a general meeting being so held a general meeting shall be held in the month next following, and may be convened by any two members" (Clause 46). Some companies hold two ordinary general meetings in the year. It is customary to declare in the Articles that all business except such as is there mentioned (*i.e.* receiving the report of the directors, sanctioning a dividend, considering the accounts and balance sheet, and electing directors and auditors)¹ shall be deemed special, and that notice must be given of the general nature of all special business. Without such a provision in the Articles it seems that no business could be transacted of which previous notice had not been given²; and where these clauses are included any business not specially mentioned as an exception can only be transacted if notice has been given.

Other general meetings may, however, be held from time to time. These are called "Extraordinary General Meetings," and at them only the special business of which notice has been given can be transacted. Extraordinary meetings can be convened by the directors whenever they think proper, and in certain circumstances may be convened by the members themselves, subject to the conditions contained in Section 66, which overrides both the original Table A and any special regulations of the company. By this section the directors are bound forthwith to convene an extraordinary general meeting on the requisition of "the holders of not less than one tenth of the issued capital of the company upon which³ all calls or other sums then due have been paid."⁴ The requisition (which may consist of several documents⁵) must state the objects of the meeting, and must be signed by the requisitionists and deposited at the office of the company. If joint holders of shares join in the requisition all must sign, unless the Articles specifically authorise one to sign for all: the signature of one on behalf of all is of no avail.⁶ As Articles cannot take away rights conferred by Statute, it is not possible to exclude any class of shareholders from the right to join in a requisition,

¹ As to the special requirements when an auditor other than the retiring auditor is proposed see page 345, *supra*.

² *Per* Littledale, J., in *Rev v. Hill*, [1825] 1 B. & C. 441.

³ The words referring to calls relate to the issued capital, not to the shares held by the requisitionists. The documents constituting the requisition need not be identical if they are substantially the same. For both these propositions see *Fruit and Vegetable Growers' Association v. Kekewich*, [1912] 2 Ch. 52.

⁴ If the Articles allow a smaller number to requisition a meeting, thus, being an additional power not inconsistent with the Act, will be effective. It seems also that preference shareholders may join in demanding a meeting, even if they are not entitled to vote thereat.

⁵ *Patent Wood Keg Syndicate v. Pearse*, [1906] W. N. 164.

though they may not have any right of voting at the meeting when held. It would seem that bearers of share warrants cannot be precluded from taking part in the requisitions, even if, under Section 37, Sub-section 4, of the Act, Articles have been adopted restricting their rights as members, for Section 66 gives the right to requisition to "holders of not less than one tenth of the issued capital," and not to "members." If the directors do not proceed to cause a meeting to be held within twenty-one days from the date of the requisition being deposited, to consider the matters specified in the requisition,¹ the requisitionists, or a majority of them in value, may themselves convene the meeting; but it must be held within three months from the date of the deposit of the requisition.² If at any such meeting a resolution requiring confirmation at another meeting is passed, the directors are bound forthwith to convene a further extraordinary general meeting to consider and, if thought fit, to confirm the resolution as a special resolution, and if they fail to do so within seven days of the passing of the first resolution the requisitionists, or a majority of them in value, may convene the meeting. Any meeting convened by requisitionists is to be convened as nearly as possible in the same manner as that in which meetings are to be convened by directors (Section 66, Sub-section 5).

There is no provision in the Act, similar to that usually inserted in Articles, that at a meeting convened by requisitionists no business is to be done other than that mentioned in the requisition; but perhaps this is implied in the provision that the requisition must state the objects of the meeting. In any case due notice must be given of any business to be transacted.

The directors have a duty, as well as a right, to circularise the members for the purpose of advising them as to the prudence or propriety of any proposed resolution, and may use the company's money for this purpose or for procuring proxies in their own favour.³

Prima facie a company can only act at a duly constituted meeting⁴; but in a company not proposing to issue any of its

¹ If the directors convene a meeting to consider part only of the specified matters the requisitionists may ignore it, and call their own meeting (*Isle of Wight Railway Co. v. Tahourdin*, [1883] 25 Ch. D. 320). If the requisition contains matters which, though apparently irregular, may be carried out in a lawful manner, the Court will not restrain the holding of the meeting (*same case*).

² The secretary cannot without the sanction of the board summon the meeting on receipt of the requisition. Whether the requisitionists can employ him to give the notice after the twenty-one days have elapsed is still an open question (*State of Wyoming Syndicate*, [1901] 2 Ch. 431).

³ *Peel v. London and North-Western Railway*, [1907] 1 Ch. 5; *Campbell v. Australian Mutual Society*, [1900] 77 L. J. P. C. 117, 80 L. T. 3, 24 Times L. R. 623.

⁴ *Geo. Newman & Co.*, [1895] 1 Ch. 674.

shares to the public an arrangement made with the full knowledge of all the members may be as binding as if it had the sanction of the company in general meeting.¹

If there are no directors, and no special provisions in the Articles to meet the case, any five members can convene a meeting under Section 67.²

If directors fail to convene the annual general meeting, the proper proportion of the members can requisition an extraordinary general meeting (see page 358, *supra*); but this does not always meet the case, for certain business (*e.g.* the appointment of auditors under Section 112, and also the submission of a balance sheet under the common form of Articles) has to be done at the annual general meeting, and to procure the holding of such meeting any member may, under Section 64, apply to the Court to call or direct the calling of a meeting, or the member may enforce penalties under that section. Clause 46 of the new Table A, however, allows any two members to summon the annual general meeting if the directors fail to do so.

Only members of the company are entitled to be present, and a member cannot insist on his solicitor or other agent being allowed to accompany or represent him, the Articles almost invariably requiring that a proxy shall himself be a member of the company. Section 68, however, gives any company registered under the Companies Acts³ which is a member of another company power by resolution of the directors to authorise any of its officials or any other person to act as its representative at meetings, and such representative has, on behalf of the company appointing him, the right to exercise the same functions as if he were an individual shareholder and must be counted in estimating the quorum present.⁴ If the chairman allows the vote of a person claiming to represent a company it is no objection that no proxy has been produced if it subsequently appears that such person was duly appointed by resolution,⁵ but there is no authority as to whether the chairman can insist upon evidence of the appointment before receiving the vote. Unless the Articles deal with the matter, a chairman should

¹ Attorney-General for Canada *v.* Standard Trust Co., [1911] App. Ch. 498. Innes & Co., [1903] 2 Ch. 251, *per* Cozens-Hardy, L. J., who says that this has been decided by "the authorities". It is not known to what authorities he referred. In British Seamless Paper Box Co., [1881] 17 Ch. D. 467, a meeting was held (see page 479, *per* Cotton, L. J.), and the dicta in Geo. Newman & Co., [1895] 1 Ch. 674 are to the opposite effect.

² Brack and Stone Co., [1878] W. N. 140.

³ The word "company," when used in the Act, is defined in Section 285, and the power given by Section 68 is therefore not exercisable by a foreign corporation (Blair Open Hearth Furnace Co. *v.* Reigart, [1913] 108 L. T. 665).

⁴ Kelantan Coco Nut Estates, [1920] W. N. 271.

⁵ Colonial Gold Reef *v.* Free State Rand, Limited, [1914] 1 Ch. 382.

allow a person claiming to represent a company to attend, but specially note how he votes, and require evidence subsequently of his appointment by resolution of the directors. Clause 65 of the New Table A allows a person not a member to be appointed a proxy by any corporation.

ADJOURNED MEETINGS.

In the absence of express directions in the Articles the chairman of a general meeting can, on proper ground, adjourn the meeting,¹ but the Articles usually require that he should do so only with the consent of the meeting, in which case he cannot, by leaving the chair before the business is completed, bring the meeting to a close; if he purport to do so, the meeting may appoint another chairman and proceed with the business.² If the Articles provide that "the chairman, with the consent of the meeting, may adjourn" (which has heretofore been the common form and was found in the old Table A), the majority cannot compel the chairman to adjourn the meeting if he thinks it ought to proceed.³ But the new Table A (Clause 55) requires the chairman to adjourn the meeting if so directed by the meeting, further providing (by Clause 59) that a poll demanded on the question of adjournment shall be taken forthwith.

An adjourned meeting is merely a continuation of the original meeting,⁴ and all the requirements as to the original meeting must have been complied with to make the adjourned meeting valid. In the absence of special regulations no further notice is necessary, and if any notices have to be given before "the meeting" this will be read as being before the commencement of the original meeting. As to the necessary notice of an adjourned meeting see also page 363.

The same quorum will be required as for the original meeting unless the Articles otherwise provide, as in Table A, Clause 52.

Proxies given for the original meeting are available for an adjourned meeting; but if the Articles require proxies to be lodged so many days before a meeting, they must be lodged that number of days before the commencement of the original meeting.⁵ To avoid this it is often provided that proxies may be lodged so many days before "the meeting or adjourned meeting;"

¹ *Reg. v. D'Oily*, [1840] 12 A. & E. 158. *Reg. v. Wimbledon Local Board*, [1882] 8 Q. B. D. 459.

² *National Dwellings Society v. Sykes*, [1894] 3 Ch. 159.

³ *Salisbury Gold Mining Co. v. Hathorn*, [1897] App. Ca. 268.

⁴ *Wills v. Murray*, [1849] 4 Ex. 483; *Scadding v. Lorant*, [1851] 3 H. L. C. 418; *McLaren v. Thomson* [1917] 2 Ch. 261.

⁵ *McLaren v. Thomson*, [1917] 2 Ch. 261.

NOTICES OF GENERAL MEETINGS.

Notice of all general meetings must be given to the members in manner prescribed by the company's Articles or by Table A. Unless all the members attend, a company is not "corporately assembled," so as to be able to do business, unless the meeting is held upon notice which gives every member the opportunity of being present,¹ and complies with the provisions of the Articles as to stating the objects for which the meeting is held²; but it is thought that a provision in the Articles that non-receipt by any member of notice or the accidental omission to give any member notice shall not invalidate proceedings, is effective (see the original Table A, Clause 35, and the new Table A, Clause 49) Where all the shareholders attend a meeting of which no notice or insufficient notice has been given they can waive the informality, and pass valid resolutions.³ A member who is in fact present and has allowed the business determined upon to be carried out for a long period cannot subsequently set up an irregularity in summoning the meeting.⁴

Under Table A seven days' notice at the least must be given to each member. Seven days' notice, if not qualified, means seven *clear days*—*i.e.* exclusive of the day of giving the notice and the day of the meeting.⁵ In the original Table A, Clause 35, this is the case; but by Clause 49 of the new Table A it is declared that the seven days shall be exclusive of the day on which the notice is served, but inclusive of the day for which the notice is given, and by Clause 110 the day of service is the day when the notice would be delivered in the ordinary course of post. With such a provision, or when these provisions are omitted, notices should be posted nine or ten days before the meeting, as they may not be delivered to some members at least till one or two days after posting. But if the notice may be given by advertisement, it will be sufficient if it appear seven clear days before the

¹ *Smyth v. Darley*, [1819] 2 H. L. C. 780, *Merchants of the Staple v. Bank of England*, [1888] 21 Q. B. D. 165 these were not cases under the Companies Acts. In the former an exception was made when "those not summoned were beyond summoning distance," *e.g.* abroad. In the latter case it was said, "There must be such knowledge or such means of knowledge as to give each shareholder the opportunity of attending" (*per* Wills, J., 21 Q. B. D. 165), but in the case of a company under the Acts the provisions of the Articles will determine how much notice is to be given.

² *Bailie v. Oriental Telephone Co.*, [1915] 1 Ch. 503, *cf.* *Young v. Ladies' Imperial Club, Limited*, [1920] 2 K. B. 523.

³ *Express Engineering Works*, [1920] 1 Ch. 466; *Oxley Motor Co., Limited*, [1921] 3 K. B. 92.

⁴ *British Sugar Refining Co.*, [1857] 3 K. & J. 108.

⁵ See *Railway Sleepers Supply Co.*, [1885] 20 Ch. D. 234, and cases there cited; also *Mercantile Investment Co. v. International Co.*, [1893] 1 Ch. at page 480, note.

meeting, and it is not necessary to show that it reached all the members on that day.¹ In general, no notice is required to be given of adjourned meetings, if held within the limits prescribed by the Articles of Association, as they are merely continuations of the previous meetings, at which, if notice was properly given, all the members have had the opportunity of being present, and those who were present have agreed to the time and place of adjournment.² But under Clause 55 of the new Table A, if the adjournment is for ten days or more, fresh notice is required.

Although the adjourned meeting is only a continuation of the original meeting,² if notice to propose a director is required to be given so many days before "the day of election," and the election takes place at an adjourned meeting, the notice is sufficient if given the specified time before the day of holding the adjourned meeting.³ It would be otherwise if the Article required notice before the meeting at which the election is to take place.⁴

When notice has been duly given of a meeting the meeting cannot be postponed by a subsequent notice⁵; the proper course is for the meeting to be held and adjourned.

In the absence of some special provision in the Articles it is not necessary to give notice to the representatives of deceased persons unless such representatives have become members by formal registration.⁶ Clause 114 of the new Table A does require notice to representative shareholders.

A notice of meeting, to be good, must be given by persons authorised to summon the meeting, and resolutions passed at a meeting convened by the secretary without the authority of the board are invalid, nor will the consent of directors separately given suffice.⁷ But if the notice purports to be issued by the authority of the directors and is subsequently ratified by them at a board meeting it will be valid,⁸ and Warrington, J., has held that a notice given by a person believing himself to be a director, and subsequently adopted by another director, was valid under an Article rendering valid acts done by persons acting as directors, although an irregularity be subsequently discovered,⁹ and Swinfen Eady, J., that the

¹ *Sneath v. Valley Gold Co.*, [1893] 1 Ch. 477.

² *Wills v. Murray*, [1840] 1 Ex. 483; *Scadding v. Lorant*, [1851] 3 H. L. C. 418.

³ *Catesby v. Burnett*, [1916] 2 Ch. 325.

⁴ See *McLaren v. Thomson*, [1917] 2 Ch. 261.

⁵ *Smith v. Parnia Mines, Limited*, [1906] 2 Ch. 193.

⁶ *Allen v. Gold Reefs of West Africa*, [1900] 1 Ch. 656.

⁷ *Hayercraft Gold Reduction Co.*, [1900] 2 Ch. 230, *State of Wyoming Syndicate*, [1901] Ch. 431.

⁸ *Hooper v. Kerr Stuart & Co.*, [1900] 83 L. T. 729.

⁹ *Transport, Limited, v. Schomberg*, [1905] 21 Times L. R. 305.

resolutions of a general meeting convened by *de facto* directors are not invalidated by any irregularity in the constitution of the board.¹

A statement in the report of the directors sent with the notice of meeting that certain business will be proposed is a sufficient notice.¹

The Articles usually provide that notice must be given of the general nature of any special business to be transacted,² and by Section 69 notice must be given of the intention to propose a special resolution. In the absence of provisions in the Articles of Association, and if Table A be excluded, no business can be brought on without notice (see page 362, *supra*). The notice must "give at any rate a fair, candid, and reasonable explanation" of the business proposed, and if something is wrapped up and kept back it will invalidate the proceedings.³ Thus, Kekewich, J., held that a notice of a meeting to adopt new Articles which might be seen at the company's office was not sufficient where the new Articles increased the directors' remuneration and borrowing power, and made other important changes.⁴

It is not infrequent for directors who are to derive some benefit under resolutions to cover it up in the notice of meeting in such a way that it shall not be fully understood by the shareholders. Such a notice is insufficient, and a resolution passed in pursuance of it will be invalid.⁵ Thus, where in a reconstruction directors did not state that they were participating in the purchase consideration to be received by the selling company,⁶ or where in seeking the sanction of the company to the retention by the directors of remuneration they had received irregularly no proper statement was made as to the amount,⁷ the resolutions passed were held to be invalid.

MINUTES OF BUSINESS DONE AT MEETINGS.

Every company must cause minutes of all proceedings of general meetings, and of its directors or managers, to be entered in books provided for the purpose, and such minutes if purporting to be signed by the chairman of the meeting or of the next

¹ Boscoback Co. v. Fuke, [1906] 1 Ch. 148.

² Table A has this provision (old Table, Clause 35, new Table, Clause 40).

³ Kaye v. Croydon Tramways, [1898] 1 Ch. 358, *cf.* Young v. Ladies' Imperial Club, Limited, [1920] 2 K. B. 523, where in a club case the rules required that the expulsion of a member should only be effected at a meeting of the committee specially convened for that purpose.

⁴ Normandy v. Ind, Coope & Co., [1908] 1 Ch. 81.

⁵ Pacific Coast Coal Mines, Limited, v. Arbuthnot, [1917] App. Ca. 607.

⁶ Kaye v. Croydon Tramways, [1898] 1 Ch. 358; Triessen v. Henderson, [1899] 1 Ch. 161. See also Clarkson v. Davies, [1923] A. C. 100.

⁷ Bailhe v. Oriental Telephone Co., [1915] 1 Ch. 503.

succeeding meeting, shall be evidence of the proceedings; and until the contrary is proved every meeting of the company, or of the directors or managers, of which minutes have been so made, is to be deemed duly held and convened, and all proceedings thereat duly had, and all appointments of directors, managers, or liquidators are to be deemed to be valid¹ (Section 71, and see the new Table A, Clause 75).

The absence of any reference to a matter in the minutes is treated as evidence that it was not brought before the company or the board, but express evidence may be given to prove what was in fact done and what resolutions have been passed.²

The usual course is for the secretary to prepare the agenda, or heads of the business to be transacted at the meeting, and to lay the same before the chairman, who brings the various items before the meeting for consideration. A good plan is to enter the agenda in an "Agenda Book," which is commonly ruled in such a way that the agenda occupy one side of the page, the other side being left for the chairman to write in his own remarks as the business proceeds. The agenda are, however, sometimes written on loose sheets of paper; but this plan is not recommended.

The secretary takes notes of the proceedings of each meeting, whether a general or board meeting, and afterwards enters them in the minute books, and reads the entries at the next general or board meeting, as the case may be. The chairman then puts them to the vote, and signs them if approved; or if any amendment is required, that is first made and initialled by him, and the minutes are then signed. In the minutes of this meeting a note should be made that "the minutes of the preceding meeting were read and signed as correct." It is not proper to say "the minutes were confirmed," as this might lead to an inference that the business recorded was reconsidered and confirmed, which is not the case. Directors present when the minutes of a previous meeting are read and signed are not thereby made responsible for the resolutions passed at the previous meeting, although they thus are fixed with notice of what has been done (see page 317, *supra*). If any matter is debated afresh, this should be the subject of a separate minute. It is improper to remove a page from the minute book. If it requires re-writing, a line should be drawn through it, leaving the page in its place. The mutilation of any book gives rise to

¹ This must of course mean in regard to matters properly entered in the minutes, and the evidence will only be that such and such proceedings were had, and not that the statements of fact contained are true.

² *Re Knight*, [1866] 2 Ch. 321, *Great Northern Salt Co.*, [1890] 44 Ch. D. 483, *Pyle Works No. 2*, [1891] 1 Ch. 184, *Umney v. Fireproof Doors, Limited*, [1916] 2 Ch. 142.

suspicion of bad faith. The minutes are constantly referred to in legal proceedings, and it is of the utmost importance that they should be full and accurate.

It is advisable to have separate minute books for general and board meetings. The former may fairly be open to the inspection of members; but the directors' minute book, containing as it does a record of the private affairs of the company, should not be accessible to any but the directors, secretary, and auditors, who will be entitled to see it for purposes of the audit. The covers of the directors' minute book are frequently secured by a lock.

BUSINESS OF GENERAL MEETINGS.

It is only at general meetings that the shareholders can exercise any control over the affairs of the company. The Articles almost invariably require the directors to lay before the meeting a report on the company's affairs and a balance sheet. The Act requires that the auditors' report on any balance sheet shall be read before the company in general meeting and be open to inspection by any shareholder (Section 113). The chairman of the company or of the directors, or, if there be no such chairman, the person elected by the meeting, takes the chair. It is his duty to preserve order, conduct proceedings regularly, and take care that the sense of the meeting is properly ascertained with regard to any question before it.¹ It is customary for the chairman to introduce the report of the directors in a speech, in which he explains the position of the company, and gives as much information about its affairs as he thinks fit. He concludes by moving that the report be adopted, in which he is seconded by another of the directors. The shareholders then comment upon or criticise the report and the chairman's speech, and ask for any further information they desire; but the chairman and directors are not bound to give any information beyond the report, and if they consider it undesirable to answer any questions they may refuse to do so. If the shareholders are dissatisfied, they may oppose the motion that the report be accepted; but even if the opposition be successful, it has no effect, for it is not necessary that the report should be accepted by the meeting. Such a rejection of the report, however, is considered a vote of censure upon the board of directors. If the dissatisfied shareholders succeed in rejecting the report, they usually move to appoint a committee of inspection; but whether this be as an amendment or by way of original resolution it would seem to require notice, for this is a matter of great moment, upon which

¹ *Per Chitty, J.*, in *National Dwellings Society v. Sykes*, [1804] 3 Ch. 159.

all the shareholders should have an opportunity of voting. Even if notice be given, and the resolution passed, the committee will have very small powers, unless it be a committee of inspection appointed under Section 110, for which purpose a special resolution must be carried by a three-fourths majority at a meeting whereof notice has been given specifying the intention to propose the resolution, and confirmed by a subsequent meeting (Section 69). If the special resolution be not carried the dissatisfied shareholders may apply to the Board of Trade to appoint inspectors. It must, however, be understood that the company cannot take the control of its affairs out of the hands of the directors, and give powers to a committee, except in the manner specified in the Articles; and accordingly, if there be no power to remove directors, the company will have to wait until the Articles are altered or the obnoxious directors retire in due course.¹ If the power to remove directors or to control their action be by special resolution, an ordinary resolution will not suffice. Often, however, when directors find the meeting hostile they assent to the appointment of a committee to report to the general meeting, which is adjourned.

Upon the report being carried, one of the directors will move the payment of a dividend in accordance with the report. The Articles usually provide that the shareholders may reduce, but not increase, the dividend recommended by the directors.

The re-election of retiring directors and the filling up of vacancies will follow, and the auditors will afterwards be elected and their remuneration fixed. This is a matter in which the directors should take no part, and which should be left entirely in the hands of the shareholders.

If there is no special business, the meeting should then terminate "with the customary vote of thanks." If, however, there is special business, the business of which notice has been given should be proceeded with. It was usual at one time to transact special business only at an extraordinary general meeting, which was often called to follow the ordinary meeting; but this is unnecessary unless the Articles expressly require it, there being no reason why special business should not be transacted at an ordinary meeting.

Prima facie, every member has a right to be heard and to advocate or oppose any resolution before the meeting²; but if a matter has been fairly debated, the chairman, with the sanction

¹ Automatic Self-Cleansing Filter Co. v. Cunningham, [1906] 2 Ch. 34, Salmon v. Quin & Axtens, [1900] App. Ca. 442

² Const. v. Harris, [1821] Turn. & R. at page 525.

of the majority, can stop the discussion, or, in modern phrase, "the closure may be adopted" after resolutions have been reasonably debated.¹

A meeting if duly called cannot be postponed by a subsequent notice issued before the meeting.² It can, however, be adjourned before any business is done. As to adjournments see page 356, *supra*.

The taking of a poll will be considered under the head of "VOTES AND POLLS AT GENERAL MEETINGS" (page 370, *infra*).

As has been seen, minutes must be taken; but there is no obligation upon the company to publish a report of the proceedings at general meetings, although with large companies it is customary to have one prepared and printed, and circulated among the shareholders.

On the ground that members have a common interest in the affairs of the company, speeches at a meeting and circulars sent by directors or shareholders to the members are privileged, and in the absence of malice will not support an action for slander or libel³; but newspapers making a report of what passes at a meeting have not a similar privilege, nor may directors or shareholders publish to the world at large defamatory statements, even though contained in the report of a meeting.⁴

MOTIONS AT GENERAL MEETINGS, AND AMENDMENTS.

Only such motions can be submitted to a meeting as fall within the notice given of business to be transacted (see page 362, *supra*); but if all the members of the company are present they can waive any irregularity⁵. The chairman usually proposes the resolutions necessary for the business brought forward by the board, and if notice has been given of other resolutions calls upon the giver of the notice to bring forward his motion. If a member during the meeting proposes a motion, then in cases where notice is required, and has not been given, or where insufficient notice has been given, the chairman should refuse to put the motion to the meeting; but an amendment of which notice has not been given may be proposed to a motion properly moved, so long as it is within the scope of the notice originally given⁶;

¹ Wall v. London and Northern Assets Corporation, [1808] 2 Ch. 400.

² Smith v. Parangula Mines, Limited, [1906] 2 Ch. 193.

³ Lawless v. Anglo-Egyptian Co., [1869] L. R. 4 Q. B. 262, Quartz Hill Co. v. Beall, [1882] 30 Ch. D. 508.

⁴ Davison v. Duncan, [1857] 7 E. & B. 229; Purcell v. Sowler, [1877] 2 C. P. D. 215.

⁵ Express Engineering Works, [1920] 1 Ch. 406; Oxted Motor Company, [1921] 3 K. B. 92.

⁶ Torboeck v. Lord Westbury, [1902] 2 Ch. 871; Henderson v. Bank of Australasia, [1890] 45 Ch. D. 330. The latter case also decided that an amendment need not be submitted in writing, but is good if its effect be made reasonably clear to the meeting orally.

and if the notice of meeting is accompanied by the directors' report, stating that certain business will be proposed, this is a sufficient notice.¹ It has been held that where the notice was of a resolution to appoint as directors three persons named in the notice it was competent for the company to add three others by way of amendment.²

Sometimes several amendments are proposed to one motion, in which case the chairman will require to exercise his discretion very carefully in allowing them and in arranging their order. He should get them all put into writing and see how far they are consistent one with another. *Primit facie* they ought to be put in the order in which they are proposed, but the nature of them will often make it more desirable to arrange them so that they may not clash. After any motion or amendment has been accepted by the meeting no amendment inconsistent with it should be submitted, as the acceptance of the prior proposal negatives the inconsistent amendment. The amendments should be disposed of before the original motion.

If the chairman improperly refuses to submit an amendment to the meeting, the resolution actually carried will be invalidated.³ Under the Act of 1862 it was held that a reasonable amendment might be proposed and made even to a special resolution at the first meeting,⁴ but not at the confirmatory meeting, when the resolution as passed at the first meeting must be accepted or rejected as it stands,⁵ but the Act of 1908 requires that the notice for the first meeting must be of "the resolution" to be proposed and it may be that this will preclude amendments of a substantial nature.⁶

Where notice has been given of several resolutions each resolution must, if any member so requires, be put separately,⁷ although if the meeting is unanimously in favour of all the resolutions it may be this would not be material. The fact that some of the resolutions submitted are *ultra vires* will not affect the validity of others, even if all were part of one scheme, e.g. for the purpose of reconstruction.⁸

¹ *Irvine v. Union Bank of Australia*, [1877] 2 App. Ca. 375, *Boschook Co. v. Fuke*, [1906] 1 Ch. 148.

² *Betts & Co. v. Macnaghten*, [1910] 1 Ch. 430.

³ *Henderson v. Bank of Australasia*, [1890] 45 Ch. D. 330.

⁴ *Torbock v. Lord Westbury*, [1902] 2 Ch. 871.

⁵ *Wall v. London and Northern Assets Corporation*, [1898] 2 Ch. 480.

⁶ See *MacConnell v. E. Prill & Co.*, [1916] 2 Ch. 57.

⁷ *Patent Wood Keg Syndicate v. Pearse*, [1906] W. N. 161; *Thomson v. Henderson's Estates, Limited*, [1908] 1 Ch. at page 776. The poll must also be taken separately (*Blair Open Furnace Co. v. Reigart*, [1913] 108 L. T. 665).

⁸ *Thomson v. Henderson's Estates, Limited*, [1908] 1 Ch. 765.

number of shares. The chairman has generally also to determine how the poll is to be taken (*e.g.* old Table A, Clause 43; new Table A, Clause 57). If there is a question of much importance to be decided, he may fix a future day, and notice should be given to all the shareholders of the appointed place and time. If the matter is not of great importance, or if there is a representative gathering of shareholders present, the poll may be taken at once.¹ In any case the votes should be taken in writing, and an entry made of how many votes each shareholder is entitled to give and actually does give. Each shareholder should sign his name as a guarantee that there is no personation. A shareholder who has not voted at the meeting may vote on the poll.² The chairman should fix the hours during which the poll is to be held. If he does not do so he cannot close the poll as long as votes are coming in³; but after waiting a reasonable time, if no more voters present themselves, he may declare the poll closed.⁴ If he improperly exclude a voter it will invalidate the poll.⁴ The chairman must declare the result of the poll, but it is most desirable that there should be scrutineers present on each side at the counting. Proxies may be used in the poll if allowed by the regulations of the company. If there are several resolutions, the poll must be taken on each separately, though all may be included in one sheet of paper, to be marked by the voters. If the vote be taken on a number of resolutions together, they cannot be validly passed.⁵

Under the common form of Articles or under Table A a poll cannot be taken by sending voting papers to the members to be returned by post. They or their proxies must attend and give the votes personally.⁶

With regard to extraordinary and special resolutions, Section 69 provides that at any meeting at which an extraordinary or special resolution is submitted a poll may be demanded by three persons for the time being entitled according to the Articles to vote, unless the Articles require a demand by such number of persons, not exceeding five, as may be specified in the Articles. This seems to mean that if the Articles are silent, or specify that more than five persons are required for the demand of a poll, the provisions of the Act will apply, and any three persons entitled to vote may demand a poll. If, however, the Articles specify that five or less

¹ *Chillington Iron Co.*, [1886] 29 Ch. D. 159.

² See note * on page 371.

³ *Reg. v. St. Pancras*, [1839] 11 A. & E. 15.

⁴ *Reg. v. Lambeth*, [1838] 8 A. & E. 356.

⁵ *Patent Wood Keg Syndicate v. Pearse* [1906] W. N. 161.

⁶ *McMillan v. Le Roi Mining Co.*, [1906] 1 Ch. 331.

persons may demand a poll, these provisions of the Articles will prevail, and a poll may be demanded by the number specified in the Articles, but not by fewer persons, and, unless the poll is demanded by the proper number of persons, the chairman's declaration of the result of the voting on the special or extraordinary resolution will be conclusive.

Table A (Clause 42 of the old Table, and Clause 56 of the new Table) extends this effect of the chairman's declaration, if accompanied by an entry in the minute book, to other resolutions. This will prevent the question being reopened in legal proceedings, even if evidence is tendered that the chairman's declaration was wrong,¹ unless an error appears on the face of the declaration of the chairman: *e.g.* where he states the number of votes given and they are insufficient,² or is plain on the face of the proceedings.³ Where the Articles of Association declared that if votes were not disallowed at the meeting they should be good for all purposes, it was held that, in the absence of fraud or bad faith, the resolution could not be impeached on the ground that votes were improperly received.⁴ Eve, J., has held that, notwithstanding a declaration by the chairman, the notice of meeting may be looked at to see if the resolution is in order.⁵

The right of bearers of share warrants to votes depends on the regulations of the company⁶; and when the Articles give this privilege they usually contain special terms upon which the power of voting is to be exercised: *e.g.* on depositing the warrants with the company.

The holders of all classes of shares have equal rights of voting unless restrictions are specifically imposed. But a provision in the Articles that holders of any class of shares shall not have votes in respect of those shares is good; and resolutions passed by those having votes are binding even when they affect the interests of all classes.⁷ One class of shareholders, however, may

¹ *Arnot v. United African Lands*, [1901] 1 Ch. 518 C. A., *Hadleigh Castle Gold Mines*, [1900] 2 Ch. 419, not agreeing with *Kekewich, J.*, in *Young v. South African Development Syndicate*, [1896] 2 Ch. 208.

² *Caratal (New) Mines, Limited*, [1902] 2 Ch. 498.

³ *Clark & Co.*, [1911] 8. C. 213 Court of Sess.

⁴ *Wall v. London and Northern Assets Corporation No. 2*, [1899] 1 Ch. 550; *Colonial Gold Reefs v. Free State Rand, Limited*, [1914] 1 Ch. 382.

⁵ *Betts & Co. v. Macnaghten*, [1910] 1 Ch. 430.

⁶ Section 37, Sub-section 4. "The bearer of a share warrant may, if the Articles of the company so provide, be deemed to be a member of the company . . . either to the full extent or for any purposes defined in the Articles." Thus if the Articles provide that bearers of warrants shall be members, and do not exclude the right to vote, they will have votes; but if the Articles state that they shall have the rights of members in respect of defined objects, and do not include the right to vote, they will have no votes.

⁷ *Barrow Hematite Steel Co.*, [1888] 39 Ch. D. 582; *MacKenzie & Co.*, [1916] 2 Ch. 450.

not vote away the rights of another: e.g. the ordinary shareholders cannot deprive the holders of preference shares of their priority if they are held under a contract,¹ and a majority cannot divide the assets among themselves to the exclusion of the remainder of the shareholders.² Thus, where certain shareholders acquired property in such circumstances that it belonged in equity to the company a resolution passed by their votes that the company should have no interest in the property was held inoperative.³

Every shareholder is entitled to vote in accordance with his own interests, although they may be different from those of the company at large: for instance, a shareholder may, if acting without fraud, vote in favour of property being purchased from himself, and the resolution will be binding even though turned by the votes of such shareholder,⁴ but as mentioned above this would not make valid a resolution giving a majority advantages at the expense of the minority. The Court will restrain the passing of a resolution by means of votes in respect of shares issued by the directors to themselves or their friends for the purpose of obtaining control of the voting power⁵; and an agreement by a vendor of shares with the purchaser that until they are transferred he will vote in a particular way will be enforced by the Court,⁶ although it seems the company could not take notice of the fact that a vote was given in breach of such an agreement. An agreement in a mortgage that the mortgagor shall retain the right of voting will be enforced by a mandatory injunction⁷; but an agreement made for a money consideration to vote for the advantage of another person in the course of a winding up is void.⁸

Sometimes the holders of debentures are by the Articles of Association given votes, and accordingly have a voice in the management of the company; but such votes could not be counted upon a special or extraordinary resolution, for the Statute specifies that such resolution must be passed by a majority of three fourths of the members entitled to vote.

¹ *Per* Rugby, L. J., in *James v. Buena Ventura Syndicate*, [1896] 1 Ch. 466. But see *Allen v. Gold Reefs of West Africa*, [1900] 2 Ch. 56.

² *Menier v. Hooper's Telegraph Co.*, [1874] 9 Ch. 350, *Cook v. Deeks*, [1916] App. Ca. 551.

³ *Cook v. Deeks*, [1916] App. Ca. 551.

⁴ *North-West Transportation Co. v. Beatty*, [1887] 12 App. Ca. 589, *Pender v. Lushington*, [1877] 6 Ch. D. 70; *Burland v. Earle*, [1902] A. C. at page 94; *Dominion Cotton Mills v. Amyot*, [1912] App. Ca. 546.

⁵ *Punt v. Symons & Co.*, [1903] 2 Ch. 506.

⁶ *Greenwell v. Porter*, [1902] 1 Ch. 530. See also *Wise v. Lunsdell*, [1921] 1 Ch. 420.

⁷ *Puddephatt v. Leith*, [1916] 1 Ch. 200.

⁸ *Elliot v. Richardson*, [1870] 5 C. P. 744.

If by transferring his shares into other names a member can increase his voting power, he is entitled to do so.¹

The Articles generally provide how joint holders of shares are to vote. Of course only one of such holders can vote, and the right is usually (as in the old Table A, Clause 46, and the new Table A, Clause 61) given to the one first named in the Register; and under Articles in the usual form it would seem that the joint holder to whom the vote is given can also give a proxy without the concurrence of the other joint holders.

Occasionally the Articles provide that preference or deferred shareholders shall not have the right to attend general meetings. This, however, appears to be contrary to the intention of the Statute, and there can be hardly any doubt that all shareholders have the right to be present at all general meetings of a company: otherwise a meeting cannot be a "general" one.

PROXIES AT GENERAL MEETINGS.

When a company is governed by the regulations of Table A "votes may be given either personally or by proxy" (Clause 48 old Table A, and Clause 64 new Table A). Special Articles of Association also almost universally have a similar provision. In the absence of this provision there is no legal right of a member to have his vote by proxy accepted.² The old Table A requires the instrument of proxy to be deposited at the registered office not less than seventy-two hours, the new Table A forty-eight hours, before the meeting at which it is to be used; but special Articles frequently reduce the time to twenty-four hours.

Usually only members of the company entitled to vote are allowed to act as proxies (Clause 49 of the old Table A, and Clause 65 of the new Table A, which, however, allows a corporation to vote by a proxy who is not a member); but Section 68 gives a company which holds shares in another company an absolute right to appoint any person as its representative (see page 360, *supra*). It is sufficient if the proxy becomes a member before he is called upon to act, whether he was or was not a member at the time of his appointment.³ A form of instrument of proxy is given in each Table A, but the words "or at any meeting of the company that may be held in the year," found in the old Table A, must be omitted if the proxy is to bear a penny stamp, for The Stamp Act, 1891 (Section 80), restricts

¹ *Pender v. Lushington*, [1877] 6 Ch. D. 70; *Moffatt v. Farquhar*, [1878] 7 Ch. D. 591.

² *Harben v. Phillips*, [1883] 23 Ch. D. 11. No such right exists at Common Law (*per* Bowen, L. J., at page 35).

³ *Bombay Burmah Trading Co. v. Shroff*, [1905] App. Ca. 213.

the use of an instrument of proxy having only a penny stamp to the meeting specified therein or any adjournment thereof. If intended to be used for more meetings than one the instrument must bear a ten-shilling stamp.¹ When so stamped a proxy to vote at "any ordinary or extraordinary meeting of the company" is valid.² A proxy to vote "at the next election" does not sufficiently specify the meeting to come within the provision allowing a penny stamp.³ The penny stamp may be either impressed or adhesive, but a proxy, unless executed abroad, cannot be stamped with a penny stamp after execution.⁴ By Section 9 of The Finance Act, 1907, proxies executed abroad may be stamped after receipt in this country. The adhesive stamp must be cancelled by having the signature of the shareholder written across it or by being otherwise obliterated.⁵ There is a penalty of fifty pounds for making or voting under an unstamped proxy, and the vote given is void (Stamp Act, 1891, Section 80, Sub-section 3).

In one case, in special circumstances, it was held that the secretary had authority to fill up the date in proxies returned without date, but in ordinary cases there would be no such authority.⁶ A proxy may in the first instance be given with a blank left for the name of the person entitled to vote if there is an authority to some person to fill in the blank,⁷ and if stamped at the time of execution it is no objection that the blanks are subsequently filled up.⁸ Where a member had notice that a requisition had been lodged to summon a meeting, and gave authority to another member to fill up a proxy for him, but the requisition was withdrawn and another lodged, the authority was held to extend to the meeting called on the later requisition.⁹ The proxy need not be actually named if he is sufficiently described to be identified.⁹ Sometimes the form of proxy authorises "the chairman of the meeting" to vote for the absent shareholder; but that is very unadvisable.

¹ See Alpe's "Law of Stamp Duties," Seventeenth Edition, page 174.

² *Isaacs v. Chapman*, [1915] W. N. 113, affirmed, [1916] W. N. 28.

³ *Reg. v. McInerney*, [1891] 30 L. R. Ir. 40.

⁴ Stamp Act, 1891, Section 80; *re English, Scottish, and Australian Bank*, [1893] 3 Ch. 385.

⁵ *McMullen v. "Sir Alfred Hickman" Steamship Co., Limited*, [1902] 71 L. J. Ch. 766.
See Alpe's "Law of Stamp Duties," Seventeenth Edition, page 25.

⁶ *Ernest v. Lonn Gold Mines*, [1897] 1 Ch. 1. A practice has arisen since this decision of issuing proxies in blank as to date of meeting, and accompanying them with an agreement authorising the proxy to fill in the date. This is questionable, and it may be that the agreement requires a ten-shilling stamp as a letter of attorney.

⁷ *Re Lancaster*, [1877] 5 Ch. D. 911. The authority may be oral only.

⁸ *Sadgrove v. Bryden*, [1907] 1 Ch. 318.

⁹ *Bombay Burmah Trading Co. v. Shroff*, [1905] App. Ca. 213.

It is the duty of the secretary to examine the instruments of proxy that may be sent in, and to report any irregularity to the directors.

As to the right of companies to be represented at meetings by persons other than members see page 360, *supra*. Where an Article requires a proxy to be under the hand of the appointor, or if the appointor is a corporation under its seal, the latter part of the requirement does not apply to such foreign corporations as have no seal, and they can appoint proxies by a document signed by an agent.¹

If the Articles require that proxies shall be lodged two days before the day for holding the meeting, and the meeting is adjourned, proxies lodged after the original day and before the adjourned meeting are invalid.² It would be different if the Article said "two days before the meeting or adjourned meeting," as is often the case.

As a poll is a continuance of the meeting, which is not at an end until the poll is taken,³ a proxy to vote at the meeting seems to include authority to vote on the poll. But if the Articles require the proxies to be lodged so many days "before the meeting or adjourned meeting," it is not sufficient that they should be lodged this length of time before the taking of the poll, for the occasion of taking the poll is not an adjournment of the meeting.⁴

"The right of a shareholder to vote by proxy depends on the contract between himself and his co-shareholders, . . . and all the requisitions of the contract as to the exercise of the right must be followed."⁵ Accordingly, proxies which are not in accordance with the regulations of the company must be rejected as invalid *e.g.* if the Articles of Association require an instrument of proxy to be witnessed, it is invalid if not so witnessed.⁶ It is for the chairman of the meeting to receive or reject proxies, and his decision is binding, unless it is proved to the Court to be wrong.⁷

Unless the Articles of Association or other document governing the meeting so require, it is not essential that the proxies should be produced at the meeting, and if duly lodged at the place

¹ Colonial Gold Reef v. Free State Rand, Limited, [1911] 1 Ch. 382.

² McLaren v. Thomson, [1917] 2 Ch. 261.

³ Reg. v. Wimbledon Local Board, [1882] 8 Q. B. D. 450.

⁴ Shaw v. Tati Concessions, Limited, [1913] 1 Ch. 292.

⁵ Per Cotton, L. J., Harben v. Phillips, [1883] 23 Ch. D. 32.

⁶ Harben v. Phillips, [1883] 23 Ch. D. 14.

Indian Zoedone Co., [1884] 26 Ch. D. 70.

required by the regulations the result of the proxies may be communicated by telegram or letter.¹

The directors may employ the company's funds in printing or sending out to shareholders proxy forms filled up with the names of the directors or their nominees as the proxies, and in stamping the forms or the envelopes in which to return them; indeed, it is their duty thus to advocate the policy which they believe to be in the interests of the company.²

No business can be done at a meeting unless a quorum is present.³ Under the new Table A, Clause 51, three members personally present form a quorum. A single member cannot be a meeting.⁴ It is doubtful whether when only one member is present proxies can be relied upon, even where the Articles fix the quorum at so many "present personally or by proxy."

Where a company is represented under Section 68 by one of its officials, he must be counted in estimating the quorum.⁵

An executor or administrator is not a member until he has taken the shares of the deceased into his own name⁶; he cannot therefore be counted in estimating a quorum, unless the Articles expressly allow it.

¹ *English, Scottish, and Australian Bank*, [1893] 3 Ch. 385.

² *Peel v. London and North-Western Railway*, [1907] 1 Ch. 5 (overruling *Studdert v. Grosvenor*, [1886] 33 Ch. D. 528); *Campbell v. Australian Mutual Society*, [1909] 77 L. J. P. C. 117, 99 L. T. 3, 24 Times L. R. 623.

³ *Howbeach Coal Co. v. Teague*, [1860] 5 H. & N. 151; *Romford Canal Co.*, [1883] 24 Ch. D. 85.

⁴ *Sharp v. Dawes*, [1876] 2 Q. B. D. 26; *Sanitary Carbon Co.*, [1877] W. N. 223.

⁵ *Kelantan Coco Nut Estates*, [1920] W. N. 274.

⁶ *Bowlug & Welby's Contract*, [1895] 1 Ch. 670.

CHAPTER III.

ACTS OUTSIDE THE POWERS OF THE COMPANY
OR OF ITS DIRECTORS.

THE acts which a company or its directors do or purport to do may be void upon several grounds, which may be summarised as follows:—(1) They may be contrary to public policy generally, as, for instance, an agreement for compounding a felony; (2) They may be forbidden by Statute, as, for instance, the holding of lotteries; (3) They may be contrary to the policy of some particular Statutes, as, for instance, a reduction of the capital of a joint stock company not carried out in accordance with the provisions of the Companies Acts; (4) They may be beyond the powers of the company, or, as it is usually expressed, *ultra vires*.

Of these the first three are illegal, and on that account void; but the last is void, not because illegal, but because, there being no power to do the act, the forms gone through which purported to perform it were inoperative, and the act, if done at all, was not done by the company, but by the person whose hand actually did it, and therefore brings the company under no liability, though if the company is claiming to set aside a transaction as *ultra vires* it must restore the other party to his original rights.¹

The doctrine, now well established, with regard to acts done *ultra vires* first took a definite shape in cases upon acts purporting or proposed to be done by railway and other companies formed under special Acts of Parliament. With regard to these it was held that the companies had no existence independent of the Acts which created them,² and that the application of their capital to any other purposes than those specified must be unlawful. No majority of shareholders, however large, could sanction the misapplication of a portion of the capital. Indeed, even unanimity would not make such a deed lawful.³ It was also declared that "a Parliamentary corporation is a corporation merely for the purposes for which it is incorporated, and it has no existence for

¹ Irish Provident Assurance Co., [1913] 1 Ir. R. 352.

² Shrewsbury &c. Railway Co. v. London and North-Western Railway Co., [1853] 22 L. J. Ch. 682.

³ Bagshaw v. Eastern Union Railway Co., [1840] 7 Hare 114; Ashbury Railway Carriage Co. v. Riche, [1875] L. R. 7 H. L. at pages 667 and 672.

any other purpose"¹; and, in the House of Lords, "It must, therefore, be now considered a well-settled doctrine that a company incorporated by Act of Parliament for a special purpose cannot devote any part of its funds to objects unauthorised by the terms of its incorporation, however desirable such an application may appear,"² and in like manner a Municipal Corporation cannot undertake trading operations not authorised by the Acts under which it is constituted.³

The same principles apply also to companies registered under the Companies Acts⁴; for such companies are in fact created by those Statutes for the purposes which are set out in the Memorandum of Association, and have no existence except for those purposes. Accordingly, in the *Ashbury Railway Carriage Co. v. Riche*,⁵ Lord Selborne said, "I only repeat what Lord Cranworth, in *Hawkes v. Eastern Counties Railway*,⁶ stated to be settled law, when I say that a statutory corporation, created by Act of Parliament for a particular purpose, is limited as to all its powers by the purposes of its incorporation as defined in that Act. The present and all other companies incorporated by virtue of the Companies Act of 1862 appear to me to be statutory corporations within this principle. The Memorandum of Association is, under the Act, their fundamental and (except in certain specified particulars) their unalterable law, and they are only incorporated for the objects and purposes expressed in that Memorandum."⁶

It is, therefore, now settled law that any act which is outside the powers of a company as defined by its Memorandum is void; and a person with whom the company has contracted *ultra vires* obtains no rights, and a judgment obtained by consent in respect of a contract made *ultra vires* may be set aside.⁷ The company, however, can retain property paid for by it, or recover moneys lent by it, although the purchase or loan were not within its powers.⁸

¹ *National Manure Co. v. Donald*, [1850] 28 L. J. Ex 185.

² *Hawkes v. Eastern Counties Railway*, [1855] 5 H. L. C. 348.

³ *London County Council v. Attorney-General*, [1902] App. Ca. 165; *Attorney-General v. Fulham Corporation*, [1921] 1 Ch. 410.

⁴ The principle does not apply to a chartered company, which has all the powers of a private person. If it acts in excess of its charter the acts are not invalid, and the proper remedy is to apply by *scire facias* for a revocation of the charter (*British South Africa Co. v. De Beers Mines*, [1910] 1 Ch. 354); but a member may obtain an injunction to restrain the company from continuing to act in a manner inconsistent with the charter (*Rendall v. Crystal Palace Co.*, [1858] 4 K. & J. 326; *Breny v. Royal British Nurses Association*, [1807] 2 Ch. 272; *Jenkins v. Pharmaceutical Society of Great Britain*, [1921] 1 Ch. 302).

⁵ [1875] L. R. 7 H. L. 794.

⁶ See also *Wenlock v. River Dee Co.*, [1885] 10 App. Ca. 354.

⁷ *Great North-West Central Railway v. Charlebois*, [1899] App. Ca. 114.

⁸ *Great Eastern Railway Co. v. Turner*, [1873] 8 Ch. 149; *Coltman v. Coltman*, [1882] 19 Ch. D. 65; *Birkbeck Building Society*, [1912] 2 Ch. at page 232; *Hardy v. Metropolitan Land Co.*, [1872] 7 Ch. 427.

The making of a payment which is *ultra vires* is a breach of trust, and the directors or others making the payment are liable to make good the amount lost to the company,¹ but in addition any person receiving the moneys with knowledge or notice that the payment is beyond the powers of the directors is liable to repay in the same manner as in any other case of trust moneys being knowingly received in breach of trust.²

"The money of the company is a trust fund, because it is applicable only to the special purposes of the company in the hands of the agents of the company, and it is in that sense a trust fund applicable by them to those special purposes; and a person taking it from them with notice that it is being applied to other purposes cannot in this Court say that he is not a constructive trustee."³

Since the Memorandum and Articles are registered, persons dealing with a company are deemed to have notice of the limitations upon the company's powers, and enter into dealings with them at their own peril if they do not ascertain what those limitations are.⁴ But this difference must be observed, that if the act which is done or contract which is made might have been done or made in a certain manner, a person who is not aware that it was not done or made in that manner is justified in assuming that all has been rightly done and all necessary conditions performed, and will accordingly be entitled to the benefit of the contract, even though in fact some of the conditions have not been performed.⁵ It is further to be noted that, although an act outside the powers given by the Memorandum cannot be ratified, an act which the company has, but the directors have not, power to do is capable of being ratified by the company⁶ by ordinary resolution, although authority to the directors to do future acts forbidden by the Articles, or the ratification of acts which the company is prohibited by the Articles from doing, can only be given by special resolution altering the

¹ *Re Sharpe*, [1892] 1 Ch. 165, *Callerne v. London and Suburban Building Society*, [1890] 25 Q. B. D. 485, 490.

² *Moxham v. Grant*, [1900] 1 Q. B. 88, *Bryson v. Warwick and Birmingham Railway Co.*, [1853] 4 De G. M. & G. 711; *Ernest v. Croydall*, [1860] 2 De G. F. & J. 175; *Hardy v. Metropolitan Land Co.*, [1872] 7 Ch. 427.

³ *Per* Jessel, M. R., in *Russell v. Wakefield Waterworks Co.*, [1875] 20 Eq. at page 479.

⁴ See page 43, *supra*, note 5.

⁵ *Royal British Bank v. Turquand*, [1856] 6 E. & B. 327; *Smith v. Hull Gas Co.*, [1862] 11 C. B. 897, *ex parte Overend, Gurney & Co.*, [1869] 4 Ch. 460.

⁶ *Brotherhood's Case*, [1862] 31 Beav. 365; *Evans v. Smallcombe*, [1809] L. R. 3 H. L. 240; *Phosphate of Lime Co. v. Green*, [1871] L. R. 7 C. P. 43; *Campbell's Case*, [1873] 9 Ch. 1; *Irvine v. Union Bank of Australia*, [1877] 2 App. Ca. 366.

Articles of Association.¹ It seems, moreover, that if a special resolution is required as a condition precedent to the doing of an act, the fact that no such resolution is filed is notice that there is no power to do the act.²

In construing the Memorandum it must be remembered that where wide general powers are given in addition to specific powers the former will only be read as ancillary to the latter and not as independent objects³; but the Memorandum must be read as a whole, and it may appear that the later clauses are really intended to include powers far beyond those contained in the earlier clauses,⁴ and express powers cannot be ignored because they differ widely from the principal objects of the company,⁵ and if the Memorandum states that each paragraph is to be read separately and without limitation by reference to other clauses effect must be given to this provision.⁶

If the Memorandum authorises an act to a limited extent, this by implication forbids any act outside the limit: *e.g.* a power to borrow up to £10,000 renders unlawful any greater borrowing,⁶ and a power to supply water in a certain parish renders *ultra vires* any supply outside such parish.⁷

Provisions which are not required by the Acts to be inserted in the Memorandum, but are in fact found there, are unalterable,⁸ unless the Memorandum itself gives the power of altering such provisions,⁹ and the Articles cannot vary the Memorandum by giving powers inconsistent with it.¹⁰ Nor can the Memorandum be in any way altered in respect of matters which the Acts require to be stated there,¹¹ except in the manner specially authorised by the Acts (as to which see page 38, *supra*), although, if the Memorandum is ambiguous or silent, contemporary Articles may explain it. Thus, it was held that where the Memorandum of Association did not make any reference to the division of the capital into preference and ordinary shares, the original Articles of Association might sanction such an arrangement, and a power to borrow or lend money not found expressly in the Memorandum

¹ *Grant v. United Kingdom Switchjack Co.*, [1880] 40 Ch. D. 139, *Boschoek Co. v. Fuke*, [1906] 1 Ch. 148.

² *Irvine v. Union Bank of Australia*, [1877] 2 App. Ca. at page 379.

³ *German Date Coffee Co.*, [1882] 20 Ch. D. 169.

⁴ *Butler v. Northern Territories Mines of Australia*, [1907] 96 L. T. 41.

⁵ *Cotman v. Brougham*, [1918] App. Ca. 511. This must be taken to overrule *Stephens v. Mysore Reefs (Kangundy) Mining Co.*, [1902] 1 Ch. 745.

⁶ *Wenlock v. River Dee Co.*, [1885] 10 App. Ca. 354.

⁷ *Attorney-General v. West Gloucestershire Water Co.*, [1909] 2 Ch. 338.

⁸ *Ashbury v. Watson*, [1885] 30 Ch. D. 376.

⁹ *Welsbach Incandescent Gas Co.*, [1904] 1 Ch. 87.

¹⁰ *Guinness v. Land Corporation of Ireland*, [1883] 22 Ch. D. 349.

¹¹ *Ashbury Railway Carriage Co. v. Riche*, [1875] L. R. 7 H. L. 653.

was held to be established by the Articles.¹ But Buckley, J., has said, "The purposes for which the Articles can be read to explain or supplement the Memorandum cannot extend to explaining or supplementing the Memorandum in respect of a matter which, under The Companies Act, 1862, must be contained in the Memorandum of Association"²; e.g. the borrowing of money by a railway company.

It must not, however, be assumed that everything is *ultra vires* which is not included in so many words in the Memorandum. Whatever may fairly be regarded as incidental to or consequential upon the objects specified ought not, unless expressly prohibited, to be treated as *ultra vires*,³ even where the Memorandum does not, as it usually does, contain a clause authorising such acts as are incidental or conducive to the other objects of the company.

The clause last referred to has been treated on several occasions as extending the powers of the company,⁴ but it must not be taken as giving powers much in excess of those expressly given or implied by law, as it has been laid down by Bacon, V. C., that such a clause "did not, nor could, nor was meant to authorise the company to do any other things than those which had been previously declared to be the 'objects' for which the company was established, but to prevent failure in accomplishing those objects"⁵; and, further, any very general words in the Memorandum, such as "to undertake any business which may appear profitable to the company," must be rejected as being repugnant to the Act, which enacts that the Memorandum must contain "the objects of the company."

The position is laid down by Buckley, L. J.,⁶ as follows:—
"To ascertain whether any particular act is *ultra vires* or not,

¹ *Harrison v. Mexican Railway Co.*, [1875] 19 Eq. 358, *South Durham Brewery Co.*, [1886] 31 Ch. D. 261, *Anderson's Case*, [1878] 7 Ch. D. 75, *Phoenix Bessemer Steel Co.*, [1875] 32 L. T. 854, 44 L. J. Ch. 673 (division of capital), *Hume v. Drachenfels Banket Gold Mining Syndicate*, [1895] 2 Mans. 146 (borrowing power). This canon of interpretation is not affected by the fact that the occasion for it is removed by *Andrews v. Gas Meter Co.*, [1897] 1 Ch. D. 361. It has since been followed in *Fisher v. Black and White Publishing Co.*, [1901] 1 Ch. 173, and *Rainford v. James Keith and Blackman Co.*, [1905] 2 Ch. 147 (power to lend money); see also *Sime v. Coats*, [1908] S. C. 751, *Ewing v. Israel and Oppenheimer*, [1918] 1 Ch. at page 110.

² *Southern Brazilian Rio Grande do Sul Railway*, [1905] 2 Ch. at page 81. This is hardly consistent with *Rainford v. James Keith and Blackman Co.*, [1905] 2 Ch. 147, where a power to lend money was inferred by the C. A. from a clause in the Articles.

³ *Attorney-General v. Great Eastern Railway Co.*, [1880] 5 App. Ca. 473; *Small v. Smith*, [1885] 10 App. Ca. 129; *Deuchar v. Gas Light and Coke Co.*, [1921] 2 Ch. 126.

⁴ *Re Baglan Hall Colliery Co.*, [1870] 5 Ch. 356, *Simpson v. Westminster Palace Hotel Co.*, [1860] 8 H. L. C. 712; *Tannton v. Royal Insurance Co.*, [1864] 2 H. & M. 135, *re Peruvian Railways Co.*, [1867] L. R. 2 Ch. 617.

⁵ *London Financial Association v. Kelk*, [1881] 26 Ch. D. 138.

⁶ *Attorney-General v. Mersey Railway*, [1907] 1 Ch. at page 99. The decision in this case was overruled in the House of Lords, [1907] App. Ca. 415, but this passage was not dissented from.

the main purpose must first be ascertained; then the special powers for effectuating that purpose must be looked for; and then, if the act is not within either the main purpose or the special powers expressly given by the Statute, the inquiry remains whether the act is incidental to or consequential upon the main purpose, and is a thing reasonably to be done for effectuating it." Then, taking the case of an hotel company, his lordship says, "In a large number of cases the maintenance of a garden and pleasure grounds would be *intra vires*. The legitimate extent of these would depend upon circumstances. The maintenance of tennis lawns or of a bowling green would, in many circumstances, be legitimate. All these and the like will, without express mention, be within the company's powers. Then I may instance other acts as to which it would be a question of fact, in the case of the particular hotel, whether it was such an act as was reasonably incidental or consequential. If, for instance, the hotel was at Bundoran, in the County Donegal, it might be *intra vires* to lay out and maintain in good order a golf links, or to acquire rights of fishing, and to own boats and supply gillies. . . . If the hotel in question were in the Strand, the proposition would cease to be true. So, again, if the hotel were situate in a place inaccessible unless special means of communication were provided, . . . it might be *intra vires* for that hotel to run a steam launch or a motor car to bring its guests to their destination. It would, in such a case, be analogous to the omnibus which the hotel in a country town sends to the railway station. The question is in each case a question of fact." In the same case in the House of Lords the test applied was, can the proposed business be regarded as "incidental to or consequential upon the use of the statutory powers"? and it was held that a general omnibus business not confined to bringing passengers to the stations of a railway company was outside its powers.¹ The question is not "whether the business can be conveniently or advantageously conducted with the principal business authorised, but whether it is by necessary implication incidental or accessory to it."² Where a chemical manufacturing company desired to subscribe a large sum to institutions for furthering scientific education, evidence was received that this would benefit the company and the proposal was held to be *intra vires*.³

Even apart from special circumstances it is not easy to say what implied powers a company has, for they will vary with every company according to its main objects. A trading company

¹ Attorney General v. Mersey Railway, [1907] App. Ca. 415.

² Attorney-General v. London County Council, [1901] 1 Ch. 781; see also Attorney-General v. Manchester Corporation, [1906] 1 Ch. 643.

³ Evans v. Brunner Mond & Co., [1921] 1 Ch. 359.

has an implied power to borrow.¹ Still more would a banking company have this power,² but not a building society.³ All companies have implied power to compromise *bond fide* disputes,⁴ and trading companies having power to deal with their property have power to mortgage it.⁵ A company formed to work a patent may purchase it.⁶ An hotel company not requiring the whole of its premises may let off part,⁷ and a colliery company may sell its surplus lands.⁸ Again, a company which has provided ferry boats in accordance with express powers may also let them on hire for excursions; and a railway company possessing weighing machines for its own purposes may allow the public to use them for hire.⁹ An insurance company may act generously and pay more than there is a legal liability upon it to pay¹⁰; a trading company may give to its employés a bonus beyond their wages.¹¹

A trading company or an association not for profit may grant a pension to a retiring officer or servant¹² or award a pension to the widow of a deceased manager.¹³ These acts of generosity may benefit the company by securing for it better service from other persons employed, but after liquidation similar acts cannot advantage the company, and are therefore *ultra vires*¹⁴; although a clause in a contract for sale of the property of the company that the directors shall be recompensed for loss of office is not illegal if the company assent to it after full notice.¹⁵ A company may surrender part of its property to enhance the value of the remainder: e.g. by surrendering shares in another company to enable it to raise fresh capital,¹⁶ and on the same principle might no doubt dedicate land for a highway to improve its other land. A company formed to carry on the business of chemical manufacturers may subscribe to institutions for the furtherance of scientific education on giving evidence that

¹ General Auction Estate Co. v. Smith, [1891] 3 Ch. 432.

² Bank of Australasia v. Brillat, [1847] 6 Moo. P. C. 195.

³ Blackburn Benefit Building Society v. Cunliffe Brooks, [1882] 22 Ch. D. 61.

⁴ Bath's Case, [1878] 8 Ch. D. 334. Irish Provident Assurance Co., [1913] 1 Ir. R. 362.

⁵ Re Patent Fide Co., [1871] L. R. 6 Ch. 83.

⁶ Leifchild's Case, [1865] 1 Eq. 231.

⁷ Simpson v. Westminster Palace Hotel Co., [1860] 8 H. L. C. 712.

⁸ Kingsbury Collieries and Moore's Contract, [1907] 2 Ch. 259.

⁹ Forrest v. Manchester Railway Co., [1862] 30 Baw. 40, London and North-Western Railway Co. v. Price, [1883] 11 Q. B. D. 486.

¹⁰ Taunton v. Royal Insurance Co., [1864] 2 H. & M. 135.

¹¹ Hampson v. Price's Patent Candle Co., [1876] 45 L. J. Ch. 437.

¹² Normandy v. Ind, Coope & Co., [1908] 1 Ch. at page 104; Cyclists' Touring Club v. Hopkinson, [1910] 1 Ch. 179.

¹³ Henderson v. Bank of Australasia, [1889] 40 Ch. D. 170.

¹⁴ Hutton v. West Cork Railway, [1883] 23 Ch. D. 654.

¹⁵ Kaye v. Croydon Tramways, [1898] 1 Ch. 573.

¹⁶ Thomson v. Trustees and Executors Corporation, [1896] 2 Ch. 454.

of the contents of the Register of Mortgages kept by the Registrar of Companies is open to some doubt (see page 284, *supra*).

The effect of borrowing for a purpose which is *ultra vires* was considered at length in the case of the Birkbeck Building Society,¹ which for upwards of sixty years carried on business as a bank without power so to do. It was held that moneys deposited in the banking business constituted unauthorised loans, and created no legal or equitable debt on the part of the society² unless it could be shown that the particular money deposited was used to pay off (a) an existing lawful debt,³ or (b) a future lawful debt,⁴ for in these cases either the depositor might stand in the shoes of the creditor paid off or the loan is lawful as not increasing the indebtedness of the company. Further, if the particular money deposited can be traced as being still undisposed of, or as having been used to purchase a specified investment, the lender could claim the money, or the investment representing it, as his property and require it to be handed over to him. These propositions were affirmed both in the Court of Appeal and the House of Lords; but as to the ultimate result the Courts were not in agreement, and the authoritative decision of the House of Lords was that, as the business carried on was *ultra vires*, but was carried on both with the moneys and property belonging to the society and with the moneys improperly borrowed, the business must be treated as belonging to the shareholders and the *ultra vires* lenders in the proportions in which they had contributed the funds with which it was established and carried on, and the assets must be distributed accordingly.⁵ The reasoning of the Law Lords is not uniform, but the basis of the decision appears to be that, although an *ultra vires* loan does not create any debt on which an action can be brought in law or equity, the money lent does not become the property of the company or society, and repayment can be enforced as long as the money can be identified either as still existing or as represented by an investment or by being placed at the company's bank. When it can no longer be identified, if it can be shown that the still existing property of the company is increased by the unauthorised borrowing, the lender is entitled to the increase, or if it can be shown that, together with moneys

¹ Birkbeck Permanent Benefit Building Society, [1912] 2 Ch. 183 (C. A.), S. C. *sub nom.* Sinclair v. Brougham, [1914] App. Ca. 398 (H. L.).

² Nor can the lenders retain securities deposited to cover such advances, except to the extent that the advances are used to pay off lawful debts (Blackburn Benefit Building Society v. Cunliffe Brooks, [1882] 22 Ch. D. 61, and [1884] 9 App. Ca. 857).

³ Cork and Youghal Railway Co., [1860] 4 Ch. 761; Wrexham, Mold, and Connah's Quay Railway Co., [1860] 1 Ch. 440; Sumner v. Harris Calculating Co., [1914] 1 Ch. 920.

⁴ Baroness Wenlock v. River Dee Co., [1887] 19 Q. B. D. 155.

⁵ Sinclair v. Brougham, [1914] App. Ca. 398.

properly belonging to the company, it has been used to create a business or a property, that business or property belongs to the company and the *ultra vires* lenders jointly in the proportions that their respective moneys have gone to create the asset. Their lordships overruled the proposition that the proper course was to pay the ordinary creditors and shareholders in full and distribute the balance between the *ultra vires* lenders,¹ and threw doubt upon the proposition that a company which had borrowed beyond its powers and mixed the borrowed moneys with its own assets could not repay the amounts so borrowed,² and that a company which has borrowed when it has no borrowing power cannot, on obtaining such a power, recognise and pay the earlier loans.³ In the Court of Appeal Fletcher Moulton, L. J., said that a company which had acquired money *ultra vires* must purge itself of such assets before it could distribute the balance among the shareholders, but this was qualified in the House of Lords by Lord Parker saying "the amount to which the assets must be purged is the amount only to which they have been increased by and still represent the borrowed money."⁴

It is to be observed that the case of the Birkbeck Bank differed from the other reported cases in that in the former the borrowing was for an unlawful purpose (*i.e.* the carrying on of banking by a building society), while in the latter the borrowing was unlawful because the company had no borrowing powers, though the money was used for a lawful purpose.

In a Divisional Court it was held that the liquidator of the Birkbeck Building Society could recover against a customer the overdraft on his banking account.⁵ In a later case⁶ it was held that money advanced for the purpose of paying existing lawful debts may be recovered, although the lender knew that the

¹ This was the course adopted by the Court of Appeal, [1912] 2 Ch. 183, following *Guardian Permanent Building Society*, [1882] 23 Ch. D. 440, which was explained as being an attempt to trace as far as possible the moneys as they existed at the time of liquidation.

² This had been held by the Court of Appeal in *Blackburn and District Building Society v. Cunliffe Brooks*, [1885] 29 Ch. D. 902, where bankers were disallowed all sums drawn by way of overdrafts, but had to give credit for all moneys paid into the credit of the society.

³ As decided in *ex parte Watson*, [1888] 21 Q. B. D. 301; *Bottomgate Industrial Society*, [1891] 65 L. T. 712.

⁴ [1914] App. Ca. at page 450.

⁵ Following *Coltman v. Coltman*, [1881] 19 Ch. D. 64, and *Blackburn and District Building Society v. Cunliffe Brooks*, [1885] 29 Ch. D. 902. The company, so far as it has made advances, can waive the irregularity, and the person who has borrowed from the company cannot allege any incompetence on his own part to make an agreement to repay the money (*Birkbeck Permanent Benefit Building Society*, [1912] 2 Ch. at page 232).

⁶ *Reversion Fund and Insurance Co. v. Maison Cosway*, [1913] 1 K. B. 364.

company had no borrowing power, for in such a case he also knew that it was to be used for a lawful purpose, and nothing is added to the liabilities of the company.

If directors pay dividends to shareholders out of capital, they are liable to replace the whole amount which they have caused to be paid to the shareholders¹; and if directors apply the funds of the company in buying the company's shares, they may be compelled to make good the money so expended.² Indeed, if they apply money of the company in any manner which is *ultra vires*, and it cannot be recovered, they are liable to the company for the loss resulting from their act, although the Court has power to relieve them in cases where they have acted reasonably and in good faith (see page 318, *supra*).

If the directors of a company are proposing to do an act which is *ultra vires*, any shareholder can in an action brought on behalf of himself and all the other shareholders obtain an injunction to restrain the unlawful act (see pages 328 *et seq.*, *supra*). Such an action cannot be brought by a stranger nor by a person who "happens to be within the range of possibility of injury."³ Thus a debenture stockholder who has no charge on the assets or an ordinary creditor cannot obtain an injunction restraining a company from paying dividends out of capital.⁴

¹ See "DIVIDENDS," page 401, *infra*.

² *Evans v. Coventry*, [1857] 8 De G. M. & G. 835; *Trevor v. Whitworth*, [1888] 12 App. Ca. 409.

³ *Ware v. Regent's Canal Co.*, [1858] 2 De G. & J. 212, 228.

⁴ *Lawrence v. West Somerset Mineral Railway*, [1918] 2 Ch. 250

CHAPTER IV.

SPECIAL AND EXTRAORDINARY RESOLUTIONS.

SPECIAL RESOLUTIONS.

For certain acts of the company an Ordinary Resolution does not suffice, and a "Special Resolution" must be passed and confirmed, as to which the requirements of Section 69 must be carefully followed, for any departure from the procedure there laid down will render the resolution void.

A resolution is a "Special Resolution" when it has been "passed in manner required for the passing of an Extraordinary Resolution,¹ and confirmed by a majority" (i.e. bare majority) "of such members entitled to vote as are present in person or by proxy (where proxies are allowed) at a subsequent general meeting, of which notice has been duly given, and held after an interval of not less than fourteen days, nor more than one month, from the date of the first meeting."

An Extraordinary Resolution is one passed by a majority of not less than three fourths of such members of the company entitled to vote as are present in person or by proxy (where proxies are allowed) at a general meeting, "of which notice specifying the intention to propose the resolution as an Extraordinary Resolution has been duly given" (Section 69). The chairman's declaration in regard to a Special or Extraordinary Resolution that it has been carried is conclusive unless a poll is demanded, and the section enacts that a poll may be demanded by three persons entitled according to the Articles to vote, unless the Articles require a demand by such number of such persons, not exceeding five, as may be specified in the Articles (see page 372, *supra*).²

The notice of meeting required by the Articles of Association must be given. Directors and secretaries are sometimes not sufficiently careful on this point, in particular forgetting that seven days' notice means seven *clear* days, whence it follows that the resolutions are void and everything done under them invalid. Equally the fourteen days' interval must be fourteen *clear* days, and a resolution passed on the first day of the month cannot be confirmed

¹ This does not mean that the notice must state that the resolution will be proposed as an *Extraordinary* Resolution, although that is required in the case of an Extraordinary Resolution. The notice should state that it will be a Special Resolution (*Penarth Pontoon Co.*, [1911] 50 S. J. 124).

² A resolution may be good as a Special Resolution if the terms of the section are complied with, even though the Articles contain further requirements which have not been complied with (*per* Joyce, J., in *Etheridge v. Central Uruguay Company*, [1913] 1 Ch. 425).

earlier than the sixteenth, and it would seem that a resolution passed on the last day of one month can be confirmed on the first day of the next month but one afterwards, but not later, the "interval" in either case being the time between the two meetings.¹

Where, however, a confirmatory meeting was convened for a date within the prescribed period, and being duly held was adjourned to a date beyond the prescribed period, a confirmation at such adjourned meeting was held to be valid on the ground that the adjourned meeting was a continuation of the original meeting.²

In giving notice of the meeting there was authority for saying that under the Act of 1862 it was sufficient to state the general nature of the business³; but if important changes were to be made in Articles (as increasing the directors' remuneration and borrowing powers) it was held that a general notice of intention to submit new Articles for adoption which may be seen at the office is not enough.⁴

Under the Act of 1908 it has been held that it is necessary to set out "the resolution" to be proposed and the fact that it is to be proposed either as a special or extraordinary resolution, as the case may be,⁵ and accordingly a notice of a resolution "to increase capital" not specifying the amount of the increase was insufficient. This makes it doubtful whether any substantial amendment can be effectively carried. Under the Act of 1862 it was held that the resolution need not be carried in the first instance exactly in the form set out in the notice: *e.g.* a resolution to pay directors as remuneration forty per cent. of the profits might have been amended so as to read thirty per cent.⁶; but the confirmation at the second meeting, whether under the Act of 1862 or that of 1908, must be without amendment, and in the same form as passed at the first meeting.⁷ A fresh notice should be given of the confirmatory meeting, setting out the words of the resolution to be submitted for confirmation. A conditional notice (*e.g.* "if the resolution is passed a confirmatory meeting will be held on the day of ") has been held to be insufficient⁸; but a positive notice of the second meeting, even if followed by a

¹ See *Railway Sleepers Supply Co.*, [1885] 29 Ch. D. 204.

² *Neuschild v. British Equatorial Oil Co.*, [1925] *Times*, 25th March.

³ *Young v. South African Development Syndicate*, [1896] 2 Ch. 208.

⁴ *Normandy v. Ind, Coope & Co.*, [1908] 1 Ch. 81.

⁵ *McConnell v. E. Prill & Co.*, [1916] 2 Ch. 57. Sargant, J., called attention to the difference in the wording of the 1862 Act and the 1908 Act.

⁶ *Torbock v. Lord Westbury*, [1902] 2 Ch. 871.

⁷ *Wall v. London and Northern Assets Corporation No. 1*, [1898] 2 Ch. 489.

⁸ *Alexander v. Simpson*, [1890] 43 Ch. D. 139.

statement that if the resolution is not passed at the first meeting notice will be given that the second meeting will not be held, is good¹; and the company may by its Articles declare that a conditional notice shall be good, in which case such a notice will suffice.² Of course to constitute a meeting the prescribed quorum of members must be present on each occasion.

As to the requisite majority, it will be observed that there must be in favour of the resolution not less than three fourths of those present and entitled to vote, and, accordingly, any member present but not voting must be counted as voting against the resolution. At the confirmatory meeting only a bare majority is necessary; but in this case also it must be a majority of those present, whether they vote or not.

An irregularity in an ordinary resolution may be cured by a subsequent ratification by the company, but for a resolution to be good as a special resolution it must be carried *modo et forma* as required by the Act: that is to say, on proper notice, by the requisite majority, and confirmed within the specified period by another resolution. Accordingly the company cannot by an ordinary resolution or by conduct make good an invalid special resolution, nor is it an objection to an action by a single shareholder to say that the company ought to be plaintiff on the ground that it can ratify the resolution, for this is not the case.³

Within fifteen days after the confirmation of a special resolution or the passing of an extraordinary resolution a printed copy thereof must be impressed with a five-shilling registration fee stamp and filed with the Registrar of Companies, under a penalty of two pounds per day for default (Section 70). The Registrar requires that the copy shall contain particulars of the time and place of passing and (in the case of a special resolution) of confirming the same, and be authenticated by the signature of the chairman, a director, or the secretary of the company.

A copy of every special resolution for the time being in force must be annexed to or embodied in every copy of the Articles of Association issued after the confirmation of the resolution, and every member of the company is entitled to a printed copy of the same upon request and payment of a sum not exceeding one shilling. Any company not complying with this provision of the Act is liable to a penalty of one pound for each copy in respect of which default has been made, and every director or manager is alike liable (Section 70).

¹ *Espuola Land and Cattle Co.*, [1900] W. N. 139, 49 W. R. 684.

² *North of England Steamship Co.*, [1905] 2 Ch. 15.

³ *Baillie v. Oriental Telephone Co.*, [1915] 1 Ch. 503.

Any kind of business may be declared by the Articles of Association to require a special resolution; but for the following a special resolution is required by law:—

1. Changing the name of the company (Section 8, Sub-section 3).
2. Altering the objects of the Memorandum of Association (Section 9).
3. Altering, modifying, rescinding, or adding to the Articles of Association or any existing special resolutions (Section 13).¹
4. Distributing accumulated profits in reduction of paid-up capital (Section 40).
5. Subdividing shares into shares of smaller amount (Section 41).
6. Reducing or cancelling capital (Section 46).
7. Declaring that a portion of the unpaid capital shall only be capable of being called up in case of a winding up (Section 59).
8. Extending the liability of directors (Section 61).
9. Appointing inspectors to examine into the affairs of the company (Section 110).
10. Turning a private company into a public company (Section 121, Sub-section 2).
11. Procuring the company to be wound up by the Court (Section 129).
12. Winding up voluntarily (Section 182). (See also "EXTRAORDINARY RESOLUTIONS," *infra*, and page 524, *infra*.)
13. Where a company is proposed to be or is in the course of being wound up voluntarily, sanctioning a sale by the liquidator to another company in consideration of shares, policies, or other like interests (Section 192).

EXTRAORDINARY RESOLUTIONS.

An "Extraordinary Resolution" is one passed in the manner described on page 391.

The precise terms of the resolution, and the fact that it is to be proposed as an extraordinary resolution must be stated in the notice.²

¹ The Court will not rectify Articles adopted by mistake, as the company has this power (*Evans v. Chapman*, [1902] W. N. 78, 86 L. T. 381).

² *McConnell v. E. Prill & Co.*, [1916] 2 Ch. 57.

As a rule an extraordinary resolution is resorted to in cases where a company is insolvent and wishes to go into voluntary liquidation at once (Section 182, Sub-section 3). In such cases the resolution must declare that the company cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up. Extraordinary resolutions may also be used in a voluntary winding up to delegate the power of appointing liquidators to the company's creditors (Section 190), or for sanctioning arrangements with creditors (Section 191), or compromises with creditors, debtors, or contributories (Section 214), or for determining how the books and papers of the company and of the liquidator are to be disposed of (Section 222). A notice of an intended special resolution is not sufficient notice upon which to propose an extraordinary resolution.¹

A copy of every extraordinary resolution must be printed and forwarded to the Registrar within fifteen days after its passing, under a penalty not exceeding two pounds a day for default (Section 70, Sub-section 1).

¹ Section 69, Sub-section 1; see *Bridport Old Brewery Co.*, [1867] 2 Ch. 101.

CHAPTER V.

THE ACCOUNTS OF A COMPANY.

THE Act does not deal with the accounts and balance sheets of companies other than banks, although, as has been stated, the matter of audit is regulated by the Act; but the Articles almost invariably deal with them, or the provisions of Table A apply unless excluded. Clause 78 of the original Table A, and Clause 103 of the new Table A, require the directors to cause true accounts to be kept—

Of the sums of money received and expended by the company, and the matters¹ in respect of which such receipt and expenditure take¹ place; and

Of the credits¹ and liabilities of the company.

The original Table prescribes that the books of account shall be kept at the registered office of the company, but the new Table allows them to be kept elsewhere if the directors think fit, and the old Table A requires that, subject to reasonable restrictions as to the time and manner of inspecting them, the books shall be open to the inspection of the members. The Articles usually provide that the directors may determine how far the books of account shall be open to the members (new Table A, Clause 105). In the absence of such an Article it is not clear what rights (if any) the shareholders have to such inspection. A *cestui que trust* has a right to see books kept by the trustees,² but it is very doubtful whether this extends to the members of a company. In an action by a shareholder on behalf of himself and all others the plaintiff can obtain inspection of documents passing between the directors and solicitors before action,³ and a director has at all times a right to see the documents of the company.⁴

The Act⁵ does not require the preparation or submission to the members of any balance sheet, profit and loss account, or report, although Section 113, Sub-sections 2 and 3, prescribes that the auditors shall make a report upon every balance sheet laid before the company in general meeting, and that such balance sheet shall be signed by two directors, or by the sole director if there is only one; and Section 26, Sub-section 3, requires that every

¹ In the new Table A the words are respectively "matter" and "take," and "assets" is substituted for "credits." The old Table A also requires accounts of the stock-in-trade of the company to be kept.

² *Re Tillot*, [1892] 1 Ch. 86.

³ *Gourand v. Edison Co.*, [1888] 50 L. T. 813.

⁴ *Burn v. London and South Wales Coal Co.*, [1890] W. N. 209.

⁵ The Assurance Companies Act, 1909, has elaborate provisions for the making up and filing of the accounts and balance sheets of assurance companies (see page 57, *supra*)

company (not being a private company) shall file with its annual summary a statement in the form of a balance sheet made up as directed by the section (see page 398, *infra*). The Articles almost invariably require a balance sheet to be laid before the company in general meeting. The old Table A (Clauses 79 to 82) gives detailed particulars of the matters to be set forth in the balance sheet and statement of income and expenditure, adding a form of balance sheet going into much detail. In practice, even when the company was governed by that Table, this provision was never observed; and the new Table A (Clauses 106 to 108) has followed the modern practice, and, while requiring a profit and loss account, balance sheet, and report to be laid before the company in general meeting once in every year, has not specified the particulars to be set out. Both Tables require that a copy of the balance sheet, and the new Table that the report, shall be sent to the members seven days before the meeting. In private companies, where it is desired to avoid any chance disclosure of the affairs of the company to strangers, it has often been provided that the report and balance sheet shall only be produced at the general meeting, although sometimes a right is given to members to inspect it at the offices of the company during seven days before the meeting. Section 113, Sub-section 3, gives every shareholder a right to inspect the auditors' report and to be furnished with copies of the balance sheet and auditors' report at a charge not exceeding sixpence for every hundred words; and Section 114, in the case of all except private companies¹ and companies registered before the 1st July, 1908, gives holders of preference shares and debentures the same right to receive and inspect the balance sheet and the report of the auditors (and other reports) as is possessed by the ordinary shareholders.

Clause 80 of the old Table A requires everything which properly belongs to the expenditure of the year to be brought into account of income and expenditure, but allows any item which may fairly be distributed over several years to be divided, and only a portion charged to the year in question. This provision is important, as showing that the Legislature did not contemplate that every expense should be made good before a dividend is declared. For instance, a premium paid for a lease may fairly be divided over the years comprised in the term of the lease; and preliminary expenses and the expense incurred in making an issue of debentures are frequently so distributed.² It would seem that losses may, in like manner, be divided over several years.

¹ This exemption ceases in the case of a private company making default in complying with the special provisions constituting it a private company (see page 451, *infra*).

² *Jamaica Railway Co. v. Attorney-General of Jamaica*, [1903] App. Ca. at page 136.

The balance sheet must contain a statement of the commission paid on the issue of any shares or debentures or the discount allowed on any debentures so far as the same has not been written off, and this must be repeated until the whole amount is written off (Section 90).

The balance sheet does not pretend to show absolutely the exact position of the company. Many matters are necessarily the subject of estimates, and frequently the balance sheet shows that assets are included on some arbitrary basis (*e.g.* "at cost"), and not at their selling value. In regard to an undisclosed reserve, Buckley, J., has said, "The result" (of omitting this item) "will be to show the financial position of the company to be not so good as in fact it is. If the balance sheet is so worded as to show that there is an undisclosed asset whose existence makes the financial position better than that shown, such a balance sheet will not, in my judgment, be necessarily inconsistent with the Act of Parliament. Assets are often, by reason of prudence, estimated, and stated to be estimated, at less than their probable real value. The purpose of the balance sheet is primarily to show that the financial position of the company is at least as good as there stated, not to show that it is not and may not be better."¹ It is not illegal for directors to make a low valuation of stock and other assets in order to create a reserve in view of future and contingent liabilities;² but it would be wrong to produce an incorrect impression for the purpose of acquiring shares cheaply from members.

Every company (not being a private company³) having a share capital must now send to the Registrar, as part of the Annual Summary, "a statement, made up to such date as may be specified in the statement, in the form of a balance sheet,⁴ audited by the company's auditors, and containing a summary of its share capital, its liabilities, and its assets, giving such particulars as will disclose the general nature of those liabilities and assets, and how the values of the fixed assets have been arrived at; but the balance sheet need not include a statement of profit and loss" (Section 26, Sub-section 3). It will be observed that, though this balance sheet is to be audited, there is no provision for any certificate or report by the auditors; but it must be assumed that it will be their duty to sign the statement, and not to pass,

¹ *Newton v. Birmingham Small Arms Co.*, [1900] 2 Ch. at page 387.

² *Young v. Brownlee & Co.*, [1911] S. C. 677 Court of Sess. The dictum of Buckley, J., cited above was approved in this case.

³ This exemption ceases to apply to a private company which does not comply with the special provisions constituting it a private company (see page 454, *infra*).

⁴ An assurance company may send a copy of the accounts and balance sheet required by The Assurance Companies Act, 1909, in place of this statement (see Section 7 of that Act).

without noting it, any untrue or misleading statement. The date of the statement need not be the same as that of the balance sheet laid before the company, and companies which are desirous of not disclosing the amount of their profits may select a date following the time fixed for the payment of dividend, so that the year's profits will have been divided before the balance is struck, and will therefore not appear. It is somewhat curious that there is not a date fixed as the earliest to which the statement is to be made up. Many instances have occurred of the date of the statement being several months, or even years, earlier than the date of the annual summary, and it would be well if future legislation altered this. The Act does not require a fresh valuation to be made of the assets, nor require their division into various classes of assets; but the statement must show how the values are arrived at. It has, moreover, been held that a statement which lumped together assets valued on one principle with assets valued on another, and tangible with intangible assets, was not a compliance with the Act.¹ It is presumed that such a statement as "Freeholds at cost price," "Stock-in-trade as valued by the managing director," "Shares and securities at their par value," or "at cost," or "at Stock Exchange prices," will be a sufficient indication of the method of valuation, and it is accepted by the Registrar as complying with the Act. No profit and loss account is required, but any balances of undivided profit will necessarily be shown, and the prosperity of the company or its misfortunes will be guessed with fair accuracy by any person accustomed to figures.

Every company incorporated outside the United Kingdom which has a place of business in the United Kingdom must file a similar statement or balance sheet (Section 274).

An assurance company may, instead of this "statement in the form of a balance sheet," send to the Registrar a copy of the balance sheet and accounts required by Sections 4 and 7 of The Assurance Companies Act, 1909.

Sections 82 to 84 of The Larceny Act, 1861 (24 & 25 Vict., Ch. 96), deal with fraudulent accounts of bodies corporate and public companies. Section 82 makes it a misdemeanour if any director, manager, or public officer shall, "with intent to defraud, omit to make or to cause or direct to be made a full and true entry" of property or money received "in the books and accounts" of the company. Under Section 83 it is a misdemeanour if any director, manager, public officer, or member shall, with intent to defraud, destroy, alter, mutilate, or falsify any book, paper,

¹ Galloway v. Schull, Seeborn & Co., [1912] 2 K. B. 354.

writing, or valuable security of any such company, or make or concur in making any false entry, or omit or concur in omitting any material particular in any book of account or other document. And under Section 84 it is a misdemeanour if any such director, manager, or public officer makes, circulates, or publishes, or concurs in making, circulating, or publishing, any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of the company, or with intent to induce any person to become a shareholder or partner therein, or to entrust or advance any property to the company, or to enter into any security for the benefit of the company.¹

It will be observed that it is an essential element of the offence, under the last-mentioned section, that there is an intent to deceive or defraud a shareholder or creditor, or to induce some person to become a shareholder or to entrust or advance property to the company, and in the London and Globe Finance Corporation's case it has been suggested that this was the difficulty felt by the law officers in advising a public prosecution in relation to certain balance sheets. The matter having been brought before Buckley, J., upon an application under Section 167 of the Act of 1862, that he should direct the liquidators to institute criminal proceedings, that learned Judge made the order asked for on the ground that a *prima facie* case was shown, and that wherever it would be the duty of a good citizen to institute criminal proceedings the Court ought to order the liquidator to do so at the expense of the company.²

"To deceive" is to induce a state of mind, and "to defraud" is to induce a course of conduct.³

Under Section 216 of the Act of 1908 it is a misdemeanour for any director, officer, or contributory of a company being wound up to destroy, mutilate, alter, or falsify any books, papers, writings, or securities, or to make any false or fraudulent entry in any register, book of account, or other document belonging to the company, with intent to deceive or defraud any person.

Under Section 281 it is a misdemeanour for any person, in any return, report, certificate, balance sheet, or other document required by or for the purposes of the Act specified in the Fifth Schedule, wilfully to make a statement false in any material particular

¹ In *Birt's case* the chairman of a dock company was sentenced to nine months' hard labour, although the jury considered he had no intention of benefiting himself by the misstatements in the accounts (*Millwall Docks Case*, 1899).

² *London and Globe Finance Corporation*, [1903] 1 Ch. 726. The trial took place in January, 1903, and a sentence of seven years' penal servitude was passed. At the trial Bigham, J., held that an intention to deceive constituted the offence without proof of any intent to defraud.

³ *Per Buckley, J.*, in case last cited.

knowing it to be false; but it is to be noted that the Act does not "require" any balance sheet, although it requires the auditors to give certificates in relation to the balance sheets submitted to the company.

The Fifth Schedule is very wide and covers practically all matters of account.

DIVIDENDS.

The manner in which the profits of the company are divided between the holders of shares must be determined in accordance with the Memorandum of Association, or, if that is silent, with the Articles; and a member can enforce against the company that payment shall be made only in the manner prescribed, although if only prescribed by the Articles it may be varied by special resolution.¹ It must be noted, however, that dividends must not be paid out of capital even if the Memorandum² or Articles of Association³ authorise such a payment, as it would be in fact a reduction of capital not authorised by the Acts.⁴ With the sanction of the Board of Trade, however, in certain special circumstances such interest may be paid (see page 402, *infra*).

Directors who wilfully pay dividends out of capital are personally liable to make good the amount.⁵ They are not, however, responsible if the payment was made relying on a *bonâ fide* valuation of assets, although such valuation subsequently proves to be an over-estimate,⁶ and credits, if believed to be good, may be included, although the amount is not actually received,⁷ unless the Articles declare the dividends payable only out of "realised profits," which means "profits tangible for the purposes of division," and does not include estimated profits,⁸ and directors may trust the officers of the company unless they have reasonable ground for suspicion.⁹ A director, moreover, is not liable for an interim dividend declared at a meeting of directors at which he was not present, although he

¹ *Oakbank Oil Co. v. Crum*, [1883] 8 App. Ca. 65.

² *Verner v. General Investment Trust*, [1894] 2 Ch. 264.

³ *Re Sharpe*, [1892] 1 Ch. 154.

⁴ See *Ginness v. Land Corporation of Ireland*, [1883] 22 Ch. D. 349; *Trevor v. Whitworth*, [1888] 12 App. Ca. 409; *McDougall v. Jersey Hotel Co.*, [1894] 2 H. & M. 528, *Flitcroft's Case*, [1882] 21 Ch. D. 519.

⁵ *Oxford Benefit Building Society*, [1887] 35 Ch. D. 502; and see *re Sharpe*, [1892] 1 Ch. 154, *Salisbury v. Metropolitan Railway Co.*, [1879] 22 L. T. N. S. 839; *re London and General Bank*, [1895] 2 Ch. 673, *Kingston Cotton Mill No. 2*, [1896] 1 Ch. 331.

⁶ *Stringer's Case*, [1869] 4 Ch. 476; *Rance's Case*, [1871] 6 Ch. 104.

⁷ *Per Lord Shand in City of Glasgow Bank v. Mackinnon*, [1882] 9 Court Sess. Ca., 4th series, 602.

⁸ *Oxford Benefit Building Society*, [1887] 35 Ch. D. 502.

⁹ *Kingston Cotton Mill No. 2*, [1896] 2 Ch. 288; *National Bank of Wales*, [1899] 2 Ch. 629, affirmed on this point in House of Lords *sub nom. Dovey v. Cory*, [1901] App. Ca. 477.

was present when the minutes of that meeting were confirmed.¹ Shareholders who receive dividends knowing that they are paid out of capital may be ordered to indemnify the directors to the extent of the amounts they have so received,² and a shareholder who with knowledge of the facts has received and still retains a dividend out of capital will fail in an action, brought "on behalf of himself and all other shareholders," to compel the directors to make immediate restitution,³ but the liquidator would not be precluded from taking proceedings.

Warrington, J., decided in 1906 that where a company borrowed money to construct permanent works the interest paid during the period of construction might properly be treated as part of the cost of construction and charged to capital.⁴ Section 91 now allows an extension of this principle. By that section, where any shares of a company are issued for the purpose of raising money to defray the expenses of the construction of any works or buildings, or the provision of any plant which cannot be made profitable for a lengthened period, the company may pay interest and charge it to capital as part of the cost of construction, but subject to stringent restrictions, which are as follows:—

1. The payment can only be made if authorised by the Articles or by special resolution and sanctioned by the Board of Trade.⁵
2. The payment must only be for the period determined by the Board of Trade, not extending beyond the half-year succeeding that in which the works are completed or the plant provided.
3. The rate of interest must not exceed four per cent., or such lower rate as may be prescribed by Order in Council.
4. The accounts of the company must show the capital on which, and the rate at which, interest is paid during the period to which the accounts relate.

There is a provision (Sub-section 6) making it clear that this payment of interest is not to operate as if it were a return of capital to the shareholders, and another (Sub-section 3) allowing the Board of Trade to direct an inquiry, at the expense of the company, into the circumstances of the case.⁶

¹ *Lucas v. Fitzgerald*, [1905] 20 T. L. R. 16.

² *Moxham v. Grant*, [1900] 1 Q. B. 88.

³ *Towers v. African Tug Co.*, [1901] 1 Ch. 558.

⁴ *Hinds v. Buenos Ayres Grand National Tramways*, [1906] 2 Ch. 654.

⁵ During 1922 no application was made to the Board of Trade; during 1923 one application was made but not proceeded with.

⁶ Companies under The Indian Railways Act, 1891, which contains somewhat similar provisions, are excluded from the section.

These provisions should be of great advantage to companies undertaking the construction of large works; but probably small companies will not find it worth while to make the application to the Board of Trade.

The proposition that dividends must not be paid out of capital (which is a general principle of law) is not the same as a declaration that dividends may only be paid out of profits (which is usually found in Articles), and so long as the capital of the company is not resorted to it is unnecessary, unless the Articles contain such a requirement as above, to show the existence of specific profits applicable to the payment of dividends.¹

It is not always easy to decide what are the profits which may be legitimately employed in paying dividends. Where the Articles state that dividends shall only be paid out of profits as a general rule the excess of the earnings of a company, after deducting the expenses of making those earnings, is the measure of the profits; but it is clear that some expenses may properly be charged to capital account--as, for instance, permanent improvements to the freehold of the company; while others may be divided over a number of years--as, for instance, substantial repairs to property, which may fairly be expected to last for some years, or the expense of an issue of debentures²; and, equally, on some occasions part of the profits ought to be set aside in each year to provide for wasting property--as, for instance, to replace leaseholds, to form an insurance fund against loss (a provision frequently made by shipping companies), or to provide for the renewal of plant which periodically becomes worn out and worthless.³ "Before arriving at the amount of profits 'available for dividend' it is only right and honest that provision should be made for the depreciation of wasting assets, such as licences, although it is still doubtful whether they can be compelled to do so and when dealing with depreciation Jessel, M. R., said, "Profits of the year of course mean the

¹ *Lee v. Neuchatel Asphalte Co.*, [1889] 15 Ch. D. 1; *Bond v. Barrow Hematite Co.*, [1902] 1 Ch. 353.

² *Jamaica Railway Co. v. Attorney-General of Jamaica*, [1893] A. C., at page 136, *per* Lord Macnaghten "Nor is every item of expenditure necessarily to be debited wholly against the income of the period in which it occurs. It may be fair and proper to spread some items over a longer time."

³ As between preference and ordinary shareholders it has been held that annual provision for depreciation is necessary, but this did not apply to arrears not made good in previous years (*Dent v. London Tramways Co.*, [1880] 16 Ch. D. 344).

⁴ *Per* Romer, L. J., in *Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co.*, [1902] 1 Ch. at page 150.

surplus in receipts after paying expenses and restoring the capital to the position it was in on the 1st January in that year."¹

Profits may exist although assets representing them have not been turned into cash, and even though no value has been put upon them in the balance sheet.²

'Before the decision of *Dovey v. Cory* in the House of Lords³ the authority in the Court of Appeal was strongly in favour of the proposition that fixed capital lost in one year need not be made good in subsequent years before a dividend was declared out of the profits (*i.e.* the excess of current receipts over current expenditure) of such subsequent years,⁴ and further showed that in some cases, at least, it was not essential to make provision for replacing wasting property; Lindley, L. J., giving as an instance that although £25,000 might have been spent in starting a newspaper without anything tangible to show for the expense, yet if the current business showed an annual profit dividends might be paid.⁵ But these cases laid down a contrary rule where floating capital (*i.e.* capital which was used up in the business, such as stock-in-trade or raw material) was depreciated or lost⁶ in the year in respect of which dividends were paid or were proposed to be paid; such depreciation in value being treated as a loss on revenue account and not on capital account. In the case of the National Bank of Wales⁷ the Court of Appeal held that when once capital (whether fixed or floating) had been lost in any manner it could not be that dividends paid in future years were paid out of the lost capital, and it was therefore not necessary to make the loss good before declaring dividends out of current profits. To this proposition the House of Lords did not accede,⁸ and further threw doubt upon the proposition that if fixed capital only had been lost dividends might still be paid; but, holding that it was

¹ *Dent v. London Tramways Co.*, [1880] 16 Ch. D. at page 351. This must be read in the light of the later cases as to how far it is necessary to make good lost capital, but it may safely be said the profits of the year cannot be ascertained until proper allowance has been made for the year's depreciation.

² *Spanish Prospecting Co.*, [1911] 1 Ch. 92.

³ [1901] App. Ca. 477.

⁴ *Lee v. Neuchatel Asphalte Co.*, [1899] 41 Ch. D. 1; *Verner v. General Investment Trust*, [1894] 2 Ch. 239; *Fisher v. Black and White Publishing Co.*, [1901] 1 Ch. at page 181.

⁵ *Lee v. Neuchatel Asphalte Co.*, [1899] 41 Ch. D. 1.

⁶ "Perhaps the shortest way of expressing the distinction is to say that fixed capital may be sunk and lost, and yet that the excess of current receipts over current payments may be divided; but that floating or circulating capital must be kept up, as otherwise it will enter into and form part of such excess, in which case to divide such excess without first deducting the capital which forms part of it will be contrary to law" (*Verner v. General Investment Trust*, [1894] 2 Ch. 239, *per* Lindley, L. J., at page 266).

⁷ [1890] 2 Ch. 620.

⁸ *Dovey v. Cory*, [1901] App. Ca. 477.

not necessary for the decision before them, they laid down no clear rule. Farwell, J., having *Dovey v. Cory* for his guidance, however, shortly afterwards decided that a realised loss arising from a surrender of leases and the pulling down of cottages, and also a general depreciation of assets appearing upon a new valuation, must be made good before any dividend could be paid out of the profits of later years,¹ and threw doubt upon the proposition that it is not necessary to provide a fund for replacing wasting assets.

The Court of Appeal, however, has held in 1918 that it is still bound by the decisions which preceded *Dovey v. Cory*, and that unless and until the House of Lords expressly overrules the earlier cases a company is not under any obligation to make good losses suffered in early years if the income of the current year exceeds the outgoings.²

Depreciation of capital assets, such as buildings and fixed plant, must be taken into account before arriving at the profits of the year, and accordingly if the Articles declare that dividends shall only be payable out of profits no dividend can be paid until such depreciation has been allowed.³ This does not conflict with the rule in *Lee v. Neuchatel Asphalte Co.* cited above, for it was there pointed out that to say dividends must not be paid out of capital is not the same as to say that they can only be paid out of profits.

Without further guidance from the Courts it is impossible to state any general propositions upon this point with certainty, but the following rules are suggested for the guidance of directors:—

- (a) When capital has been lost, then, even though neither the Act nor the Articles may impose a fetter on the payment of dividends, they must not be paid before the loss has been made good if the circumstances are such that no honest and reasonable man of business could consider such a course commercially sound. Regard must be had to the nature of the business and the amount of the loss.³ A *bona fide* valuation showing an appreciation in the value of capital assets might be a justification from a commercial point of view.⁴
- (b) Attention should be paid to the Articles, which sometimes limit the fund available for dividend.
- (c) Subject to the principle stated in paragraph (a), losses of capital, whether circulating or fixed, in past years

¹ *Bond v. Barrow Hematite Steel Co.*, [1902] 1 Ch. 353; but see the comment of Scrutton, L. J., in the case cited in the next note at pages 297-8.

² *Ammonia Soda Co. v. Chamberlain*, [1918] 1 Ch. 266.

³ *Dent v. London Tramways Co.*, [1880] 16 Ch. D. 354; *Thomas v. Crabtree*, [1912] 106 L. T. 40.

⁴ *Ammonia Soda Co.*, *supra*, and *Stapley v. Read Brothers*, [1924] 1 Ch. 1.

can be ignored for the purposes of a subsequent year in which profits have been made and are proposed to be distributed. (It is submitted, however, that as a general rule it would not be commercially sound to ignore a loss on circulating capital.)

- (d) A loss of fixed capital in a year in which profits have been made may be ignored, and dividends may be declared and paid for that year out of those profits; but a loss of circulating capital in such year cannot be ignored, because to do so would be to declare and pay dividends out of gross profits.
- (e) Every company should, as far as possible, provide for unexpected losses by creating a reserve fund.
- (f) Provision should be made out of profits for replacing depreciation or wasting property, such provision being measured by the length of time during which the property may reasonably be expected to last; and in like manner sums should be set aside to allow for debts proving bad. Depreciation charged in the accounts but which has not in fact occurred may be written back.¹
- (g) Accidents such as ordinarily occur should be made the subject of insurance, the premiums being paid out of profits, or a sum carried to an insurance fund.
- (h) If the loss is large, so that it cannot be made good out of profits within a reasonable period, the capital should be reduced with the sanction of the Court.

It has been suggested that the proper method of ascertaining the profits of the year is to value the assets of the company and its liabilities, including the liability to the shareholders for capital subscribed, and that the excess of assets over liabilities is the measure of the profits.² This rule is convenient in some cases, and where it applies is a very safe method; but it certainly is not the essential test, as will be seen from the cases cited above.³ The fact is that in most cases capital account and revenue account are distinct, and that, although a certain number of cross entries are necessary, the two accounts should be kept quite separate.⁴ This will avoid a difficulty which is almost insuperable when the two accounts are mixed—viz., the valuation of the assets in which

¹ *Ammonia Soda Co.*, [1918] 1 Ch. 206, and *Stapley v. Read Brothers*, [1921] 1 Ch. 1.

² There is a full discussion of what are profits in *Spanish Prospecting Co.*, [1911] 1 Ch. 92, where the methods of valuation and the practice of companies in this respect are considered.

³ See also *Mills v. Northern Railway of Buenos Ayres*, [1870] 5 Ch. 621, 631.

⁴ *Bolton v. Natal Land Co.*, [1892] 2 Ch. 124; *Verner v. General Investment Trust*, [1894] 2 Ch. 230.

the capital is invested. Suppose a company has a portion of its capital invested permanently in factories, warehouses, and office buildings: the value of these may rise or fall according to the condition of the real estate market, the price of materials, or the comparative popularity of the sites they occupy. But it would be very inconvenient if each year valuers had to determine the figure to represent these assets, and if when real estate was rising in value a profit was shown, and when falling a loss declared. Or, again, when a life assurance office has, perhaps, several millions of pounds invested in marketable securities, it would be disastrous if the time of valuing them fell at a moment of depression on the Stock Exchange, a great loss accordingly having to be declared in comparing the value of the assets with their value in the previous year.

With regard to trust companies, it was decided that where the company's business is to hold investments, the directors may divide any surplus income after paying expenses, even though the capital value of the investments is greatly reduced; but where the business is to deal in and turn over stocks, shares, &c., the fall in value of those in the company's name is part of the loss on the year's trading, and must be allowed for before a dividend is declared.¹ This is in fact the distinction between fixed and floating capital referred to above; but if the loss is irretrievable (*e.g.* some of the investments have been sold at less than cost) it is no longer safe to rely upon the authority. If a company sells its business for more than its whole nominal capital, it may treat the surplus as profit, and divide it by way of dividends or bonus among its members²; and if a company has made good the depreciation of its capital out of profits, it may, on the capital rising in value, restore the amount taken from income.³ But a realised accretion to the value of one item of the capital assets cannot be deemed to be profit without reference to the result of the whole account fairly taken.⁴ On this principle it has been held that where a company formed on the trust principle (*i.e.* keeping capital and revenue accounts distinct) made a profit by redeeming debentures at less than par, it could not divide this profit without making good a loss on capital account. "Profit for this purpose" (*i.e.* for division) "is not constituted by one individual gain, but by a surplus of gains of all kinds over losses of all kinds during some definite period. . . . I am

¹ *Verner v. General Investment Trust*, [1894] 2 Ch. 239.

² *Lubbock v. British Bank of South America*, [1892] 2 Ch. 198, in which case the principles of keeping accounts are discussed.

³ *Bishop v. Smyrna and Cassaba Railway No. 2*, [1895] 2 Ch. 596.

⁴ *Foster v. New Trinidad Lake Asphalt Co.*, [1901] 1 Ch. 208.

clear that the gain involved in the reduction of the liability on the debenture stock was a gain in respect of capital or on capital account."¹ On the other hand where a railway company's capital was said to be lost, but it was entitled to an annuity for the use of the railway terminable in a few years, it was held that it might distribute the annuity in dividends without making provision for replacing the lost capital.² Where sufficient assets would be left to answer the paid-up capital, a realised profit on capital assets can be divided, unless forbidden by the constitution of the company. In this respect a company to which the Companies Clauses Consolidation Acts apply is in the same position.³

If the Articles are silent as to the distribution of profit, or declare that it shall be divided among the shareholders "in proportion to their shares" (as is done in Clause 72 of the original Table A), the division must be made, not according to the amount paid up on the shares, but to the nominal amount of the shares, so that a shareholder whose shares are fully paid up gets no more per share than one whose shares are only partly paid up.⁴ But if one series of shares were nominally £50, and another nominally £10, the holders of the former would be entitled to five times as much as the holders of the latter, whatever amount might be paid up on them respectively. The new Table A, and most special Articles, provide for dividends being paid in proportion to the amount paid up, and in such a case the above rule does not apply.⁵

As between the holders of preference and of ordinary shares the Articles ought carefully to prescribe the rights of each class, for it is entirely a matter of agreement how far the former are to be preferred. In particular, it is most important to state whether the preference dividend is to be "cumulative." If there are no words to restrict the rights of preference shareholders to the current year, they are entitled to have deficiencies of previous years made up subsequently.⁶ But if the words are, "The profits of *each* year shall be applied, first, in paying a dividend on the preference shares; secondly, the balance shall be applied in paying to the ordinary shareholders," &c., or "The yearly profits shall be applied first in payment of the preference dividend, and,

¹ *Wall v. London & Provincial Trust, per Younger, J.*, [1920] 1 Ch. 45; *per Sargant, J.*, [1920] 2 Ch. 582.

² *Lawrence v. West Somerset Mineral Railway*, [1918] 2 Ch. 250.

³ *Cross v. Imperial Continental Gas Association*, [1923] 2 Ch. 553.

⁴ *Oakbank Oil Co. v. Crum*, [1883] 8 App. Cas. 65.

⁵ See *The Companies (Consolidation) Act, 1908*, Section 39, Sub-section 3, which authorises the payment of dividend in proportion to the amount paid up.

⁶ *Webb v. Karle*, [1875] 20 Eq. 550; *Foster v. Coles and M. B. Foster & Sons*, [1906] W. N. 107, 22 T. L. R. 555; *Henry v. Great Northern Railway*, [1857] 1 De G. & J. 606; and see page 30, *supra*.

subject thereto, shall be distributed among the holders of ordinary shares," the preference shares, if not paid in full in any year, would have no claim in subsequent years.¹

Where the dividends on the preference shares depend on the profits of each year, the question as to what expenses should be treated as payable out of income becomes of great importance. Amounts necessary for renewing or replacing wasting property ought to be spread over a series of years, and not all charged to revenue account in one year; but they should not fall on capital.² An excessive quantity of stores should not be purchased out of revenue in one year; but it does not follow that any excess of stores at the end of the year over stock at the beginning of the year should be treated as profit and divided.³ Interest paid on borrowed moneys during the construction of permanent works may be treated as part of the cost of construction and debited to capital.⁴ The business must be carried on fairly, with regard to the interests of all parties and not manipulated for the benefit of any one class.⁵

Sometimes, either for the purpose of computing interest on a class of shares, or for fixing the remuneration of a manager or director entitled to a share of profits, the question is raised as to income tax. The rule is that this tax is a part of the profits of the business, and no deduction can be made for it in arriving at what are the net profits of the year; but from a fixed dividend the tax is deducted before payment, *e.g.* if a class of shares is entitled to a dividend of ten per cent. this dividend is subject to deduction of income tax⁶; if a manager is to be paid a proportion of the net profits he will receive his share of the full profits without deduction by the company of the income tax it has to pay; but will be liable to the Crown for payment of the tax on his own income⁷; excess profits duty, on the other hand, must be deducted before arriving at the amount of the profits of which he is to receive a proportion.⁸

It should be noted that warrants or cheques or other orders issued in payment of dividends or interest by a company must have annexed, or be accompanied by, a statement of the gross amount, the rate and amount of the income tax appropriate thereto, and the net amount paid (Finance Act, 1924, Section 33, Sub-section 1). A company which fails to comply with this requirement

¹ *Staples v. Eastman Co.*, [1896] 2 Ch. 303; *Adair v. Old Bushmills Distillery*, [1908] W. N. 23. ² *Dent v. London Tramways Co.*, [1880] 16 Ch. D. 344.

³ *Jamaica Railway Co. v. Attorney-General of Jamaica*, [1893] App. Ca. 127.

⁴ *Hinds v. Buenos Ayres Grand National Tramways*, [1906] 2 Ch. 654.

⁵ *Jamaica Railway Co. v. Attorney-General of Jamaica*, [1893] App. Ca. 127; and see note ⁸, *supra*.

⁶ *Attorney General v. Ashton Gas Co.*, [1904] 2 Ch. 621; [1906] App. Ca. 10.

⁷ *Johnston v. Chestergate Hat Co.*, [1915] 2 Ch. 338.

⁸ *Patent Castings Syndicate v. Etherington*, [1910] 2 Ch. 254.

incurs a penalty of £10 for each offence, but so that the aggregate amount of penalties in respect of any one distribution of dividends or interest shall not exceed £100 (Sub-section 2).

The holders of preference shares cannot prevent the company setting aside profits earned in any year to make good losses in previous years if good faith is observed. Their right to dividend is, in the absence of express bargain to the contrary, subject to the directors' right to carry sums to reserve.¹ But where debentures are issued with interest payable only out of profits the whole of the profits must be applied for this purpose.²

As to other rights of holders of preference shares to dividend see page 27, *supra*.

The Articles frequently declare that "the profits available for dividends" shall be applied in a certain order. These words mean the profits after making proper reserves and applying for other purposes such sums as the directors may properly so apply, and the holders of preference shares cannot compel a full division of the profits earned without regard to the proper provision of reserves and writing off for depreciation.³

The Court will not compel a company to divide its profits up to the hilt. It is both lawful and proper to carry forward a portion of the year's profits or place them in a reserve fund, even though the Articles contain no provision for so doing,⁴ unless there is some provision directing the distribution of profits which is inconsistent with placing them to reserve (see page 414).

The new Table A, and most special Articles, empower the directors to declare an interim dividend. Before doing this it is their duty to satisfy themselves that the profits are sufficient to justify the payment.

Unless the Articles otherwise provide, dividends and bonuses are payable to those who are registered holders at the time of the declaration.⁵ As soon as a dividend is properly declared it is a debt payable to the members, and if not paid within the period limited by the Statute of Limitations is irrecoverable⁶; but, as money payable under the Articles of Association is a

¹ *Bond v. Barrow Hematite Steel Co.*, [1902] 1 Ch. 358, where Farwell, J., also said the Court would be very reluctant to compel directors to divide more than they thought proper. But the directors must act fairly in the interests of all classes (*Henry v. Great Northern Railway*, [1857] 1 De G. & J. at page 638).

² *Heslop v. Central Paraguay Co.*, [1910] 54 Sol. J. 234.

³ *Fisher v. Black and White Publishing Co.*, [1901] 1 Ch. 175; and compare *Crichton's Oil Co.*, [1901] 2 Ch. 184, [1902] 2 Ch. 86.

⁴ *Burland v. Earle*, [1902] App. Ca. 95.

⁵ *Easton Union Railway Co. v. Symonds*, [1860] 5 Ex. 237; *Taylor, Phillips & Rickard's Case*, [1897] 1 Ch. 307.

⁶ *Severn and Wye Railway*, [1896] 1 Ch. 559. Until declared, however, it cannot be enforced (*Bond v. Barrow Hematite Steel Co.*, [1902] 1 Ch. 358).

specialty debt, the period of limitation is twenty years from the declaration of the dividend.¹ In a liquidation such a debt, however, does not rank in competition with the amount due to other creditors (Section 123, Sub-section 1, vii.); but the declaration of an interim dividend does not necessarily create a debt, and the directors' resolution to pay it may be rescinded.²

Dividends can only be paid in cash, unless there are words authorising payment by the issue of shares in the company fully or partly paid up, or the distribution among the members of assets (as, for instance, shares in other companies) in specie.³

Dividends are payable at the date when they are declared to be payable; and if a transmission of interest has occurred "all payments made by the name of dividend, bonus, or otherwise out of the revenue of trading or other public companies,"⁴ divisible between all or any of the members of such respective companies, whether such payments shall be usually made or declared at any fixed times or otherwise, . . . shall . . . be deemed to have accrued by equal daily increment during and within the period for or in respect of which the same revenue shall be declared or expressed to be made," and "shall be apportionable in respect of time accordingly."⁵ When a holder of shares dies the dividends accruing are apportionable as at the date of his death, the portion up to that date forming part of his general estate, on which death duties are payable, and passing to the residuary legatee; the balance of the current dividend going to the specific legatee (if any) of the shares, or, if they are not specifically bequeathed, forming part of the income of the estate⁶; and there is similar apportionment on the death of a tenant for life.⁷ As between a tenant for life and remainderman the question who is entitled to the dividend depends on the time and manner of its declaration, and not on the time when the profits were earned.⁸ But a payment to shareholders out of revenue, to be apportionable, must be one which is declared or expressed to be made for a definite period, though it need

¹ *Artisans' Land and Mortgage Corporation*, [1904] 1 Ch. 796; *Drogheda Steam Packet Co.*, [1903] Ir. R. 512.

² *Lagunas Nitrate Co. v. Schroeder*, [1901] 85 L. T. 22.

³ *Wood v. Odessa Waterworks Co.*, [1889] 42 Ch. D. 645; *Hoole v. Great Western Railway Co.*, [1868] 3 Ch. 262.

⁴ As to what are "public companies" see *Jones v. Ogle*, [1872] 8 Ch. 192, and *re Griffith*, [1879] 12 Ch. D. 655. It was said that all companies registered under the *Companies Acts* are for this purpose public companies ("Landley on Companies," Sixth Edition, page 643). Even "private companies" as defined by the Acts of 1908 and 1913 are "public companies" for the purpose of the Apportionment Act (*Theobald v. White*, [1913] 1 Ch. 231).

⁵ Apportionment Act, 1870, Sections 2 and 5.

⁶ *Re Griffith, Carr v. Griffith*, [1879] 12 Ch. D. 655; *Pollock v. Pollock*, [1874] 18 Eq. 329.

⁷ *Re Clive*, [1873] 18 Eq. 213.

⁸ *Bouch v. Sproule*, [1887] 12 App. Ca. 385; *Armitage v. Garnett*, [1893] 3 Ch. 337.

not be periodical in the sense that it is one usually made at recurring intervals.¹ As a rule both dividends and bonuses are income and go to the tenant for life; but if the company has determined to capitalise the profits, this binds the shareholders, and in their hands the profits thus appropriated must be treated as capital.² The distribution of a reserve fund in the form of shares in another company may be a division of income, even if made contemporaneously with a sale of the assets of the company, and a distribution of the proceeds as capital, provided that it appears that the company's intention was not to capitalise the reserve³; the matter is, however, not decided one way or the other by calling the distribution a dividend: it is necessary to see what is the real intention of the company.⁴ Where a bonus is declared and a call of equal amount declared contemporaneously the inference is that the company intends to capitalise profits to this extent.⁵ If a winding up intervenes, all accumulated profits subsequently divided must be treated as part of the corpus of the trust estate,⁶ but the fact that profits have been carried to reserve does not affect their character while the company is a going concern.⁷ Whether or not profits have been capitalised by the company is a question of fact in each case.⁸

The provisions of the Apportionment Act are not affected by a clause in the Articles of the company that dividends shall be deemed to accrue on the day on which they are declared.⁹ But, as companies usually have Articles of Association whereby they only recognise the executors or administrators of a deceased member, this provision is of practical importance only to the executors or administrators, for the company pays the whole of the dividend to them, and they divide it. For the purposes of death duties the apportionment has to be strictly made in regard to dividends paid after the death of the testator or intestate. Upon a sale of shares the dividend declared after the date of the contract for sale belongs to the purchaser of the shares, unless the contract otherwise provides, as by the sale being made "*ex div.*"¹⁰

¹ Jowitt, *in re*, [1922] 2 Ch. 442.

² Sugden v. Alsbury, [1890] 45 Ch. D. 237; Ellis v. Barfield, [1891] W. N. 84, 60 L. J. Ch. 488; Malam v. Hichens, [1894] 3 Ch. 578; Bouch v. Sproule, [1887] 12 App. Ca. 385; Ogilvie v. Ogilvie, [1919] W. N. 32; Speir, *in re*, [1924] 1 Ch. 359.

³ Andrew v. Thomas, [1916] 2 Ch. 331.

⁴ *Per* Cozens Hardy, M. R., [1916] 2 Ch. at page 343.

⁵ Hockin v. Hatton, [1917] 1 Ch. 357.

⁶ Armitage v. Garnett, [1893] 3 Ch. 337.

⁷ Andrew v. Thomas, [1916] 2 Ch. 331; Bridgewater Navigation Co., [1891] 2 Ch. at page 327.

⁸ Jones v. Evans, [1913] 1 Ch. 23; Andrew v. Thomas, [1916] 2 Ch. 331. The Court has to ascertain the intention of the company, which will prevail even though it cannot compel the shareholders to acquiesce, but has to give them the option of taking cash or shares.

⁹ Oppenheimer v. Boatman, [1907] 1 Ch. 399.

¹⁰ Black v. Homersham, [1879] 4 Ex. D. 24.

It is not infrequent to provide by the contract with the vendor, or the contractor executing works for the company, that during construction he shall pay interest upon the capital of the company. It has never been held that this is illegal, but it is not an advisable course, as it is clear that the contractor can only afford to make this repayment by originally making an overcharge in the contract price, so that the transaction really amounts to the company handing the contractor a portion of its capital to be repaid by him to the shareholders in the form of dividends, an arrangement which differs but little, if at all, from paying dividends out of capital.

Where, however, the vendor of a going concern, in order to show his confidence in it, guarantees a dividend for a certain number of years, there can be no sound objection to such a course. The wording of such a guarantee must, however, be carefully considered.

If the guarantee is given to the company the amounts payable will it seems form part of the general assets of the company, and not be capable of division among the members, unless, including these sums, there is an excess of assets over liabilities, and this will also be the case if the purchase price has been increased to allow of the guarantee, so that it really is paid by the company.¹ If the contract is made with the company as trustee for the shareholders, and is *bonâ fide*, the amount may be distributed, even when there is a deficiency of profits,² and the creditors have no interest in it, for it does not form part of the assets of the company.³ It is a question of interpretation in each case whether the guarantee makes the sums received part of the assets of the company or belongs to the members.⁴ The company may for good consideration release such a guarantee.⁵ The closing of a portion of the business carried on at a loss does not relieve the guarantor.⁶ Whether the total discontinuance of business would do so will depend upon whether the agreement is to be construed to make this a condition. In the case of a contract with the company as trustee for the members, *primâ facie* the guarantee would continue.

The interest upon debentures or on money paid up in advance of calls is a debt, and must be paid whether there are profits or not.⁷

¹ *Re Stuart's Trusts*, [1876] 4 Ch. D. 213, *Regent Street Fur Co. v. Diamond*, [1915] 1 Ch. 759.

South Manharan Colliery, ex parte Jegon, [1879] 12 Ch. D. 503, *Gellydeg Colliery*, [1878] 38 L. T. 440, *Richardson v. English Spelter Co.*, [1885] W. N. 31; *Stark v. Fife Coal Co.*, [1890] 1 F. 1173.

² *Waterford Railway Co.*, [1880] 5 L. R. Ir. 102.

³ *South Manharan Colliery, ex parte Jegon*, [1879] 12 Ch. D. 503.

⁴ *Sheffield Nickel Co. v. Unwin*, [1877] 2 Q. B. D. 214.

⁵ *Brown & Co. v. Brown*, [1877] 36 L. T. 272.

⁷ *Lock v. Queensland Investment and Mortgage Co.*, [1896] App. C. 461.

The Articles usually provide that the company may retain any dividend against debts due from a member entitled to the dividend, and that dividends shall not bear interest as against the company. The latter provision, however, seems unnecessary, as debts do not bear interest unless by agreement. It is also frequently provided that dividends unclaimed for three or five years may be forfeited for the benefit of the company; but this provision should not be inserted if there is any likelihood of the company applying for an official quotation, as the Rules of the London Stock Exchange do not allow such an Article. Any such forfeiture must be carried out with the utmost strictness. Where a company gave notice of the dividends declared to the first named of two joint holders and continued to give the notice in that manner after knowledge of his death, a forfeiture of the dividends was held to be invalid.¹

RESERVE FUND.

The Articles of Association almost invariably provide that a portion of the profits may be set aside, before any dividend is declared, to form a reserve fund.² Sometimes they provide that a fixed proportion shall be set aside, and often give special directions as to how the fund is to be invested. A company may, however, without any special authority contained in its Articles, carry profits to reserve, and either use the reserve in the business or invest it in such securities as the directors may think fit, there being no obligation to place the amount in "trustee securities" or to use it in the business.³ But if the Articles expressly declare that the profits are to be applied in certain proportions among the different classes of shareholders, and contain no reference to a reserve fund, no part can be carried to reserve,⁴ and where they specify a particular method of placing amounts to reserve, a shareholder can obtain a declaration that all further profits must be applied as directed by the Articles.⁵

The amount carried to reserve may affect the respective rights of the preference and ordinary shareholders, particularly in cases where the preference dividend is not cumulative. In such case, if the Articles authorise the creation of a reserve fund, "it will be the duty of the directors to fix the amount of the fund to be

¹ *Ward v. Dublin North City Milling Co.*, [1919] 1 R. 5.

² See Clause 99 of the new Table A.

³ *Burland v. Earle*, [1902] App. Cas. at page 95.

⁴ *R. Paterson & Sons v. Paterson* (House of Lords), [1916] W. N. 352; [1917] S. C. (H. L.) 13.

⁵ *Eyling v. Israel & Oppenheimer, Limited*, [1918] 1 Ch. 101.

retained with reference to the general interest of all classes of shareholders, and not to favour any one class at the expense of the other."¹

Sums are often set aside to represent depreciation of plant and buildings, and to provide for debts proving bad. This is in the nature of a reserve fund; but it is more usual to write the depreciation off the book value of the plant and buildings, and to keep the reserve for bad debts out of the balance sheet. How far this is legitimate depends on the facts of each case. If done in good faith and to a reasonable extent, the Courts will not interfere, even at the instance of preference shareholders who get less than their full dividend.²

It is very desirable that a reserve fund should be built up, a portion of the profits in each year not being distributed. The reserve fund may either be specially invested in stocks or funds, or shares of other companies, or it may be used in the general business of the company.³ If so used, it will appear in the balance sheet on the debtor side, and the credit side will be increased by the assets which the fund has been used to purchase.

The reserve fund may be divided into various special portions, and when very large profits have been made in one year it is convenient to make a special reserve for equalising dividends, the intention being to spread the distribution of it over several years. Sums may be taken from the reserve fund to make up losses or to pay dividends, even if it consists of premiums received on the issue of shares³: in fact, the reserve fund is undivided profit, and may be treated as profit at the disposal of the company, subject only to any restrictions which the Articles of Association may impose.

If a reserve fund comes to be divided, whether while the company is a going concern or in liquidation, it remains "profits," and the members are entitled to share in it in accordance with their rights to the profits. Thus, if the Articles provide that the members shall be entitled to share in the profits in certain proportions, they will have the same rights in the distribution of the reserve fund. Consequently, if there is anything due to the preference shareholders in respect of past dividends their claim must first be satisfied⁴; but if the preference shareholders have received their preferential dividend in full, the

¹ *Per* Lord Cranworth in *Henry v. Great Northern Railway*, [1857] 1 De G. & J. at page 638.

² *Bond v. Barrow Hematite Co.*, [1902] 1 Ch. 353; *Fisher v. Black and White Publishing Co.*, [1901] 1 Ch. 175; *Burland v. Earle*, [1902] App. Ca. at page 95.

³ *Hoare & Co.*, [1904] 2 Ch. 208.

⁴ *Bishop v. Smyrna and Cassaba Railway*, [1895] 2 Ch. 265.

reserve fund will belong exclusively to the ordinary shareholders.¹ On the other hand, if their respective rights do not arise till the declaration of a dividend and none has been declared, or till the profits have been made "available for dividend by some act of the directors which has become impossible owing to the liquidation, it appears that in a winding up any undivided profits will merge in the ordinary assets."²

It was held that if the reserve fund is used in the business of the company, and a loss arises on capital account, the loss must upon a reduction of capital be apportioned rateably between capital and reserve³; but the House of Lords having now held that capital may be reduced without proving that it is lost, the above rule would seem no longer to apply.⁴

If a sum is taken from the reserve fund and paid by way of bonus to the shareholders, the company is only concerned to see that the persons whose names are on the Register of Members at the time get the bonus. When shares are settled, questions may arise between tenants for life and remaindermen; but the company, which takes no notice of trusts, is not concerned.

Directors often desire to have a "secret reserve fund" on which they can draw in case of an unexpected loss without causing the discredit attaching to drawing upon the general reserve fund. A resolution for creating such a reserve and directing that the auditors should not disclose any particulars to the shareholders was held to be unobjectionable as to the first part, but *ultra vires* so far as it forbade the auditors to disclose any matters which ought to be contained in their report as required by The Companies Act, 1900, Section 23 (now replaced by Section 113).⁵

CAPITALISATION OF PROFITS.

Recently it has been a very common practice for companies which have large undivided profits to convert them into capital and divide among the members, in proportion to their rights, fully paid shares representing the increased capital. The process is not a new one, it having come before the House of Lords in 1887 upon a dispute between tenant for life and remainderman, as to whether the shares so received were income belonging to the former, or capital which must be retained by the trustees for the benefit of present and future beneficiaries. The House of Lords held that the question depended upon the action and intention

¹ *Bridgewater Navigation Co.*, [1891] 1 Ch. 155, 2 Ch. 317.

² *Crichton's Oil Co.*, [1901] 2 Ch. 184, [1902] 2 Ch. 86.

³ *Houie & Co.*, [1904] 2 Ch. 208.

⁴ *Poole v. National Bank of China*, [1907] App. Ca. 229.

⁵ *Newton v. Birmingham Small Arms Co.*, [1906] 2 Ch. 378.

of the company, and that what it declared to be capital was capital as between the parties interested in the trust estate of which the shares formed part.¹ During the Great War very large profits were earned by many companies, and it became very common for large amounts of undivided profits to be capitalised and distributed among the members in the form of fully paid bonus shares. For some time the Commissioners of Inland Revenue made claims that the shares so divided formed part of the income of the recipients, and although it was admitted that income tax had already been paid by the companies, it was asserted that super tax was payable by the shareholders upon the face value of the shares they received. Though this claim was put forward at an early date it was generally resisted, and it became known that the Commissioners for the Special Purposes of the Income Tax Acts had allowed appeals against the assessments made for super tax under this head, and that no appeal to the Courts from their decision had been brought by the Commissioners of Inland Revenue; the number of cases in which profits were capitalised increased, and in some of them millions of pounds were involved, so that the super tax payable, if rightly claimed, would be very large. In these circumstances the Crown determined to appeal to the King's Bench Division in two cases. In Blott's case² the Articles contained a provision that any general meeting declaring a dividend might direct payment by the distribution of paid-up shares of the company, and in Greenwood's case³ the Articles provided that the board might from time to time carry the reserve fund or any part of it to capital account and issue fully paid shares in respect thereof to the members, according to their priorities, in proportion to their holding. In Blott's case a bonus at the rate of thirty-three and one third per cent., free of income tax, was declared on the ordinary shares for the year 1914, and satisfied by the distribution of 33,316 unissued second preference shares of one pound each credited as fully paid, and a similar bonus was declared for the year 1915 and satisfied in like manner by the distribution of 50,000 unissued second preference shares credited as fully paid. In Greenwood's case a bonus of £25,286 was satisfied in the year 1913 by the issue of 25,286 fully paid ordinary shares, and the allotment was made by the directors, who sent a notice to the shareholders stating that so many ordinary shares credited as fully paid had been allotted, for which the share certificate

¹ *Sproule v. Bouch*, [1887] 12 App. Ct. 385. See p. 412, *supra*, for other cases following this ruling.

² *Inland Revenue Commissioners v. Blott*, [1920] 1 K. B. 114.

³ *Inland Revenue Commissioners v. Greenwood*, reported together with Blott's case, [1920] 1 K. B. 114.

was enclosed, and a similar procedure was adopted in each of the years 1914, 1915, 1916, and 1917. On none of these occasions, either in Blott's case or Greenwood's case, were the shareholders given any option of taking the bonus in cash, nor were they required to make any application for the shares. In Blott's case an agreement was made between the company and a trustee for the shareholders that the shares should be treated as fully paid up by the bonus. Rowlatt, J., held¹ that for the purposes of super tax the shares allotted as above could not be treated as part of the total income of the respective shareholders, as they were, in fact, an addition to their capital in the year in question, and this judgment was upheld by the Court of Appeal¹ and by a majority in the House of Lords.² It has been suggested that where no option is given to the shareholders to take the bonus in cash the shares are not fully paid as against the company; but where the Articles authorise the satisfaction of a dividend or bonus in fully paid shares it seems that the declaration of the dividend or bonus makes the shareholder a creditor of the company for the amount of his proportion,³ and that the release of his claim against the company for this amount is a good and sufficient consideration or set off so as to make the shares fully paid, even though the release is, under the Articles, compulsory. It is usual in such cases to have an agreement made between the company and a trustee for the shareholders who receive the fully paid shares that they shall be treated as fully paid, the bonus being applied for this purpose, and this is a wise course to pursue although it is doubtful whether it is necessary.

The transaction can only be carried out where the Articles authorise the satisfaction of a dividend or bonus by the issue of fully paid shares, or declare that the directors may apply any such dividend or bonus in paying up an equivalent amount of unissued shares, otherwise any shareholder can insist on receiving the amount falling to him in cash,⁴ in which case, no doubt, the amount paid would have to be counted in assessing the shareholder for super tax. On a winding up, however, undivided profits of past years and of the year in which the winding up occurs cease to be profits and become assets. No super tax is payable by shareholders upon the sums they receive under a distribution of assets in a winding up.⁵

¹ [1920] 1 K. B. 114.

² [1921] 2 App. Ca. 171.

³ *Severn & Wye Railway Co.*, [1890] 1 Ch. 550

⁴ *Hoole v. Great Western Railway Co.*, [1868] 3 Ch. 262; *Wood v. Odessa Waterworks Co.*, [1880] 42 Ch. D. 645.

⁵ *Inland Revenue Commissioners v. Burrell*, [1923] 2 K. B. 478.

EXAMINATION OF AFFAIRS BY INSPECTORS.

The Board of Trade may, upon application, appoint inspectors to examine into the affairs of a company (Section 109),¹ subject to the following conditions:—

1. In the case of a banking company having a capital divided into shares, upon the application of members holding not less than one third of the shares for the time being issued.
2. In the case of any other company having a capital divided into shares, upon the application of members holding not less than one tenth ² of the shares for the time being issued.
3. In the case of a company not having a capital divided into shares, upon the application of not less than one fifth of the whole number of persons for the time being entered as members.

The applicants must be able to furnish the Board of Trade with such evidence as may be necessary to satisfy it that there is sufficient reason for requiring an examination, and that they are not actuated by any malicious motive in instituting the same. The Board of Trade may also require the applicants to give security for the payment of all the costs of the examination before appointing inspectors.

An inspector may examine upon oath any officer or agent of the company in relation to its business, and he may require the production of any book or document relating to the business of the company, or may put any question relating to the company's affairs. Under Section 109, Sub-section 5, any officer who refuses to produce any book or document, or to answer any question, will be liable to a penalty of five pounds for each offence.³

The company itself may by special resolution appoint inspectors without reference to the Board of Trade, and those inspectors will have the same powers and duties as those appointed by the Board, except that they must report as the company shall direct, instead of to the Board of Trade (Section 110).

The report of the inspectors is evidence of their opinion in relation to any matter contained in the report (Section 111), but of course it is not evidence of the facts.

¹ Applications under this section are infrequent. During 1922 six applications were made, of which three were withdrawn, one was refused, and in the other two cases the companies went into liquidation. During 1923 eight applications were made, four were withdrawn and four refused.

² Altered from one fifth by the Act of 1907, Section 44.

³ The High Court will not grant a prohibition against the holding of such an examination (*Grosvenor Hotel Co.*, [1897] 70 L. T. 337).

CHAPTER VI.

ALTERATIONS OF CAPITAL.

A COMPANY may make alterations in its capital in various ways:—

1. It may increase its capital.
2. It may reduce its capital.
3. It may enforce forfeitures of shares, and, under certain conditions, accept surrenders.
4. It may consolidate its shares into shares of larger amount, and convert its paid-up shares into stock, and subsequently reconvert the stock into shares.
5. It may subdivide its shares.

But these alterations can only be made within certain limits, and each transaction will be considered separately.

1. INCREASE OF CAPITAL.

In considering an increase of capital the “capital” of the company is the nominal capital authorised by the Memorandum of Association, and must not be confused with the issued capital or the paid-up capital. For instance, to make a further issue of shares already authorised, or to make a call upon the shares already issued, would increase the issued share capital or the paid-up capital respectively, but neither proceeding would be such an increase of capital as to fall within the provisions of the Acts as described hereafter. On the other hand, to cancel unissued capital would not reduce either the issued or the paid-up capital, but it would none the less be a reduction of capital, and accordingly, until expressly allowed by the Act of 1877, it required the sanction of the Court. But in dealing with other reductions of capital the matter involved is often the issued capital or the paid-up capital—as, for instance, when sums paid up are returned to the members subject to recall, thereby reducing the paid-up capital; or a surrender of shares is sanctioned, thus reducing the issued capital; but in neither case affecting the nominal or authorised capital.

A Company Limited by Shares may, if authorised by its Articles, increase its share capital by the issue of new shares of such amount as it thinks expedient. A Company Limited by Guarantee having a share capital, if registered since the 31st December, 1900, may, if authorised by its Articles, increase or reduce its share capital in the same manner and subject to the same conditions as a Company Limited by Shares (Section 56).

Guarantee Companies registered before the 1st January, 1901, can increase their capital by a special resolution altering their Articles of Association.

Where a company has not power to increase its capital it was held in the Court of Appeal that a single special resolution purporting to make the increase sufficed, for this in substance effected the alteration of the Articles so as to authorise the increase¹; but in the case of a reduction of capital it is necessary that there should first be an alteration of the Articles giving the necessary power and a subsequent special resolution effecting the reduction.²

Where a company has power in its Articles to increase its capital without a special or extraordinary resolution it is unnecessary to do more than pass an ordinary resolution, or the company may confer on its directors the power to make the increase³; but in any case notice must be given to the Registrar of Companies within fifteen days after the date of passing the resolution or confirming the special resolution for the increase (Section 44). The penalty for neglect is five pounds for every day during which the neglect continues, and every director or manager who knowingly and wilfully authorises or permits the default is alike liable (Section 44, Sub-section 2); and five per cent. interest is payable on the amount of the duty (Revenue Act, 1903, Section 5). It should be borne in mind that this notice of increase in the nominal capital is to be registered within the time mentioned above—not deferred until the shares are actually taken up. If the company by resolution authorises the directors to increase the capital to a named amount, the duty is payable as at the date of and to the amount specified in the company's resolution, and does not depend on the exercise by the directors of the authority given to them.⁴ The notice of increase must be given on the prescribed form, impressed with a fee stamp regulated by the amount of the nominal increase and with a five-shilling registration stamp, and be filed with the Registrar. The return to be made on each allotment (Section 88) is in addition to this notice.

Besides the Notice of Increase of Capital, a Statement of Increase of the Nominal Capital has also to be registered, which

¹ Campbell's Case, Hippisley's Case, [1873] 9 Ch. 1.

² Patent Invert Sugar Co., [1886] 31 Ch. D. 166; see page 426, *infra*.

³ *Per* Eve, J., in *Moseley v. Koffylontem Mines*, [1910] 2 Ch. 382, but this does not authorise the issue of such shares if other Articles require the sanction of the company in general meeting to such issue (*per* C. A. and H. L. in same case), *Koffylontem Mines v. Moseley*, [1911] 1 Ch. 72; and [1911] A. C. 409, in which the decision of Eve, J., as above, was not disputed.

⁴ *Attorney-General v. Anglo-Argentine Tramways*, [1900] 1 K. B. 677.

must first be impressed with a duty stamp at the rate of one pound per cent. on the nominal amount of the increase, in accordance with Section 112 of The Stamp Act, 1891, as amended by Section 7 of The Finance Act, 1899, and Section 39 of The Finance Act, 1920.

Many irregularities have from time to time occurred with regard to the issue of additional capital, and a few remarks are necessary to warn companies against some of the dangers which surround this question.

It has been seen that if the Articles authorise an increase of capital, it may be made without any special formality; but if the original Articles do not authorise such an increase they should first be altered by a special resolution, and then the increase can be made in accordance with the terms of the special resolution,¹ but the operation is not invalid if the two acts are done by a single special resolution.² Until a few years ago the decisions of the Courts were to the effect that if the original Memorandum or Articles did not authorise the issue of preference shares the Articles could not be so altered as to make the issue of preference shares possible,³ and the only manner of enabling such shares to be issued was to obtain the consent of all the holders of the existing shares, or to wind up and reconstruct the company; but doubt was thrown on this view in the House of Lords,⁴ and the Court of Appeal has now declared that unless the Memorandum expressly states the rights of various classes of shareholders the company can by special resolution take power to issue preference shares.⁵

For some years when fresh capital was required for a company whose affairs were not in a flourishing condition it was very common to issue new shares at a discount: that is to say, a share credited as fully paid was issued in consideration of the payment of a less sum than the nominal amount of the share. It has, however, been decided by the House of Lords that this cannot be done, and a shareholder taking shares upon those terms is, in the event of a winding up, liable to pay the balance unpaid, notwithstanding any contract made with the company, and even if the contract has been filed with the Registrar of Companies⁶; and it was decided by the House of Lords (Lord

¹ Patent Invert Sugar Co., [1886] 31 Ch. D. 166.

² Campbell's Case, [1873] 9 Ch. 1.

³ Hutton v. Scarborough Cliff Hotel Co., [1865] 2 Dr. & Sm. 514, 6 N. R. 10.

⁴ British and American Trustee Corporation v. Couper, [1891] App. Ca. 416.

⁵ Andrews v. Gas Meter Co., [1897] 1 Ch. 361.

⁶ Ooregum Gold Mining Co. v. Roper, [1892] App. Ca. 125; *ex parte Sandys*, [1889] 42 Ch. D. 98.

Herschell dissenting) that calls on such shares should be made in a winding up for the benefit of contributories as well as creditors.¹ Under the Act a company is able, on making a public issue of its shares, to pay a commission if the Articles authorise it; and where a company is in difficulties it can, by fixing this commission at a large amount, say five or ten shillings in the pound, produce an effect similar to issuing its shares at a discount.

Except in the case of a commission authorised by the Act, an issue by a company of bonus shares to subscribers or others is equivalent to issuing shares at a discount, and the recipients will be liable to pay the whole amount in cash²; but an attempted issue of stock as a bonus without first issuing shares and then converting them will not create any liability, for it cannot be said that the holders ever agreed to take any shares; the whole of such transaction is a nullity.³ If bonds are entitled to a bonus or interest only out of profits, it is unlawful when there are no profits to satisfy this bonus or interest by the issue of shares, for there is no valuable consideration for such issue.⁴ If on an issue of fully paid shares the consideration given is illusory, or permits an obvious money measure to be made, showing that a discount has been allowed, no contract will protect the holders; but, except in such a case, the Court will not inquire as to what is the real value of the consideration.⁵ If vendors or others who have a large number of fully paid shares agree to give them to subscribers for debentures or new shares no objection can be taken, unless these shares have in reality been added to the purchase price, and this is only an indirect way of the company paying a commission. If there is a re-arrangement of capital, and the vendor surrenders his shares to the company, by whom they are afterwards issued as fully paid bonus shares to the subscribers for other shares, those subscribers will be liable to pay up the amount.⁶

Shares may, however, be offered at a premium, which should be carried to the credit of the reserve fund, although there is no absolute rule that this should be done.

It is not uncommon, when an additional issue of shares is made, to secure the success of the issue by getting it "underwritten." This is legal (see pages 158 to 164, *supra*).

¹ *Welton v. Saffery*, [1897] App. Ca. 200, *Weymouth and Channel Islands Steam Packet Co.*, [1891] 1 Ch. 66.

² *Welton v. Saffery*, [1897] App. Ca. 200.

³ *Home and Foreign Investment Co.*, [1912] 1 Ch. 72.

⁴ *Bury v. Pamatuna Corporation*, [1910] App. Ca. 489.

⁵ *Re Theatrical Trust*, [1895] 1 Ch. 771; *re E. J. Wragg*, [1897] 1 Ch. 796.

⁶ *Ames's Case*, [1896] W. N. 79.

When the Articles of Association provide that the new shares shall first be offered to the existing shareholders, this must be done before offering them to the public, and a reasonable time must be allowed for them to accept or reject the offer.

2. REDUCTION OF CAPITAL.

As has been before observed, cases of companies wishing to reduce their capital are much more frequent than might be supposed. There was no provision in the Act of 1862 whereby a reduction of the capital of a Company Limited by Shares could be effected. That defect was remedied by the Companies Acts, 1867, 1877, and 1880, the provisions whereof are now repeated in Sections 46 to 55 of 1908.

By Section 46 (Sub-section 1) a Company Limited by Shares (and by Section 56 a Company Limited by Guarantee having a share capital registered on or after the 1st January, 1901) may, if authorised by its Articles, by special resolution, subject to confirmation of the Court, reduce its share capital "in any way." These words "in any way" give the effect of the decision of the House of Lords on the earlier Acts,¹ but Section 46 gives also special instances, providing expressly that it may—

- (a) Extinguish or reduce the liability on any of its shares in respect of share capital not paid up; or
- (b) Either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost or unrepresented by available assets; or
- (c) Either with or without extinguishing or reducing liability on any of its shares, pay off any paid-up share capital which is in excess of the company's wants.²

This is in addition to the power, under Section 41, to cancel shares which at the date of the passing of the resolution have not been taken or agreed to be taken by any person, and diminish the amount of share capital to that extent, and the power, under Section 40, to return accumulated profits to the shareholders in reduction of the paid-up capital, but increasing the unpaid capital to an equal amount—an operation rarely effected.³ This

¹ *Poole v. National Bank of China*, [1907] App. Ca. 229.

² This includes capital which can only be called up in case of a liquidation (*Midland Railway Carriage Co.*, [1907] W. N. 175). The petition must state and affidavits verify the fact that the amount to be returned is in excess of the company's wants (*re Tarapaca & Tocopilla Nitrate Co.*, [1917] W. N. 356).

³ A case occurred in 1910 where, there being some shares fully paid and some partly paid, a portion of the accumulated profits was returned to the fully paid shareholders only, so as to make all shares paid up to the same extent. As the company paid large dividends, some of the fully paid shareholders sought an injunction, but failed, *Swinfen Eady, J.*, holding that there was no irregularity and the Court had no control over the transaction (*Neale v. City of Birmingham Tramways*, [1910] W. N. 175).

last-mentioned reduction requires a special resolution before it is adopted, and if none is passed, or only a retrospective resolution, the payments will be held to be dividends out of profits, and there will be no reduction of capital.¹

It will be observed that the word "capital" under the above provisions is used in three different senses: sometimes the nominal capital is reduced, but not the issued or paid-up capital; sometimes the issued capital is reduced but not the nominal capital; and sometimes the paid-up capital is reduced either with or without a corresponding reduction in the nominal capital, or the reduction may affect equally the nominal, the issued, and the paid-up capital.

A reduction of capital may, with the sanction of the Court, be effected in any manner, even though it involve doing things which without such sanction are entirely forbidden, such as the purchase of the company's shares by itself or a rearrangement of the rights of the members,² or a subdivision of shares in which the amount unpaid is not equally divided between the resulting shares³; and the Act adopts the decision which establishes that, subject to the rights expressly given by the Acts to creditors to object in cases of any diminution of liability in respect of capital or repayment to members, the Court has jurisdiction to sanction any reduction of capital, and will do so if the scheme is fair as between the various classes of shareholders.⁴ When the rights of creditors do not intervene "the only questions . . . to be considered are—(1) Ought the Court to refuse its sanction to the reduction out of regard to the interests of those members of the public who may be induced to take shares in the company? and (2) Is the reduction fair and equitable as between the different classes of shareholders?"⁵ The jurisdiction of the Court is not limited to the cases expressly mentioned in the sub-section above quoted, and although the company ought in its petition to show all the facts and circumstances of the case, such as whether or not the capital sought to be written off is lost or is unrepresented by available assets,⁶ this is not a necessary condition for obtaining the sanction of the Court, and the reduction may be affirmed even where there is no loss of capital, or there is a reserve fund of undivided profits left subsisting, and available for payment of

¹ *Whitman v. Piercy*, [1907] 1 Ch. 289.

² *British and American Trustee Corporation v. Couper*, [1894] App. Ca. 399; *Credit Assurance and Guarantee Corporation*, [1902] 2 Ch. 601.

³ *Doloswella Rubber Estates*, [1917] 1 Ch. 213.

⁴ *Poole v. National Bank of China*, [1907] App. Ca. 229.

⁵ *Per Lord Macnaghten*, [1907] App. Ca. at page 239.

⁶ *Per Lord Parker in Caldwell v. Caldwell & Co.*, [1915] W. N. 70.

future dividends.¹ Where there is no unfairness to any class of shareholders it is the policy of the Legislature to entrust the prescribed majority of the shareholders with the decision whether there should be a reduction of capital, and, if so, how it should be carried into effect.² A return of capital to the shareholders has been sanctioned, and the capital reduced, although a portion of the amount returned was to be at once borrowed by the company from the shareholders on debentures³; and this may be enforced on a reluctant minority, even where the repayment is made to some only of the members, if the scheme is fair to all.⁴ But the Court will of course refuse to sanction any reduction which works injustice to either the creditors or a minority of the members, and it is submitted that the company cannot obtain power to do anything otherwise irregular by making it part of a scheme of reduction unless it is in reality in the nature of a reduction of capital. It is sometimes argued that the cases cited in note² allow the Court to render valid any alteration of the rights of the members (*e.g.* in regard to dividend or voting); but a comparison of the cases on reduction will show that, except when the variation was only the direct result of reducing capital, the Articles have in every case contained clauses allowing a majority to vary the rights of the respective classes of shareholders.⁵ However, under Section 120, it seems that a variation of the rights of various classes can, with the sanction of the Court, be effected even when the Articles contain no power for the purpose (see pages 24 and 25, *supra*), and it is now common for a reduction of capital to take effect only if other arrangements varying the rights of the different classes of shareholders become operative.⁶

It should be borne in mind that no reduction of capital can be effected except "by special resolution," and that, with the exception of the reduction by repayment of profits under Section 40, the Statute requires that a company before passing such a resolution shall be so authorised by its Articles. Therefore, if the original Articles do not authorise the resolution, there must be, first, a

¹ This was held under the old Acts (*Poolo v. National Bank of China*, [1907] App. Ca. 229, overruling *Anglo-French Exploration Co.*, [1902] 2 Ch. 855, and some of the dicta in *Barrow Hematite Steel Co.*, [1900] 2 Ch. 846).

² *British and American Trustee Corporation v. Couper*, [1904] App. Ca. 309, *De la Rue & Co.*, [1911] 2 Ch. 361.

³ *Re Nixon's Navigation Co.*, [1897] 1 Ch. 872. For the most recent case of return of surplus assets see *Lees Brook Spinning Co.*, [1906] 2 Ch. 394.

⁴ *De la Rue & Co.*, [1911] 2 Ch. 361.

⁵ The *Dunlop Pneumatic Tyre Co.'s case* (unreported) was an exception. The appeal from the decision of Joyce, J., was abandoned.

⁶ See for instance *re Hoare & Co.* No. 2, [1910] W. N. 57.

special resolution altering the Articles, and, secondly, another special resolution (which must be subsequent to and not contemporaneous with the resolution altering the Articles)¹ reducing the capital.² These conditions must be complied with before an Order of Court confirming a reduction can be obtained. Any shareholder may appear in court and object, and the Court may, if a proper case, allow him his costs even when the objection fails.³

The special resolutions must of course be registered, and a copy of the Order of Court (where one is required), with a Minute, approved by the Court, giving particulars of the reduced capital, must also be registered before the reduction can be effected (Section 51, Sub-section 1). The Registrar then certifies the registration, and his certificate is conclusive evidence that all the requirements of the Act have been complied with, and that the capital is as stated in the Minute (Sub-section 4). In cases where accumulated profits are returned under Section 40, a memorandum (in the form of a Minute) giving the required particulars of the reduced capital also has to be registered (Section 40, Sub-section 2).

The Minute, when registered, is substituted for the corresponding part of the Memorandum of Association, and must be embodied in every copy subsequently issued, under a penalty of one pound per copy (Section 52).

The reduction takes effect only on the registration of the Minute (Section 51, Sub-section 2), after which the liability of a member is only the difference (if any) between the amount paid or to be deemed as paid, as the case may be, and the amount of the share as fixed by the Minute (Section 53).

Where the capital of the company is divided into preference and ordinary shares, the preference shares are not necessarily exempt from reduction equally with the ordinary, although the effect of the reduction will be to give the preference shareholders a lower rate of interest upon the capital they originally brought into the business, even where the reduction is sanctioned at a meeting where the preference shareholders have no votes.⁴ If the holders of the preference shares have not a preference in the distribution of the capital of the company, as well as in the dividend, this seems to be the proper course. But

¹ The first portion of the resolution for reduction may be passed at the same meeting as the confirmation of the resolution altering the Articles (*John Crossley & Sons*, [1892] W.N. 56).

² *Patent Invert Sugar Co.*, [1886] 31 Ch. D. 106; *Oregon Mortgage Co.*, [1910] S. C. 964 Court of Sess.

³ *De la Rue & Co.*, [1911] 2 Ch 361.

⁴ *Bannatyne v. Direct Spanish Telegraph Co.*, [1887] 31 Ch. D. 287; *Mackenzie & Co.*, [1916] 2 Ch. 450.

if there is a preference as to capital, the proper course appears to be that the reduction shall be made upon the ordinary or deferred shares alone,¹ or if it appears that the assets are not more than sufficient to represent the preferential capital the ordinary or deferred shares or founders' shares may be extinguished,² leaving the capital of the shares with preferential rights intact. A reduction affecting only the ordinary shares may, according to decisions of North, J., and Kekewich, J., be made where the preference shareholders have no preference as to capital, if the ordinary shareholders fully understand and assent to the scheme proposed to them.¹ But Kay, J., was of opinion that such a reduction is not one which ought to be sanctioned.³ The matter is usually the subject of a compromise between the interested parties, and an arrangement by which preference shareholders agree by a majority sufficient to comply with the Articles to forego arrears of cumulative dividend, as a concession to the ordinary shareholders, is not *ultra vires*.⁴ Where the preference shareholders of the company objected, Cozens-Hardy, J., refused to sanction a scheme reducing their capital equally with that of the ordinary shareholders, on the ground that, as the company could pay dividends, notwithstanding loss of fixed capital, no need was shown for the reduction⁵; but the Court of Appeal, while affirming the decision, made it clear that they did not consider the simple fact of the company being able to continue to pay dividends a good reason for refusing to sanction the reduction; nor did the judgment below go so far as that.

Where shares have been forfeited the amount paid up before forfeiture may be written off and the shares treated as having nothing paid up thereon.⁶

The Scotch Court sanctioned a reduction of preference shares from ten pounds to five pounds ten shillings and ordinary shares from ten pounds to one pound, leaving the voting power at one vote for every share, although the preference shares were entitled under the Memorandum to a preference on the winding up.⁷

If the Articles contain powers for the variation of class rights, a reduction of the capital of a company will be sanctioned in

¹Quebrada Copper Co., [1889] 40 Ch. D. 363, Barrow Hematite Steel Co., [1889] 39 Ch. D. 582, Gatling Gun, Limited, [1890] 43 Ch. D. 628; Agricultural Hotel Co., [1891] 1 Ch. 396; Mckenzie & Co., [1910] 2 Ch. 450.

²Floating Dock Co. of St. Thomas, [1895] 1 Ch. 691; London and New York Investment Corporation, [1895] 2 Ch. 800; Poole v. National Bank of China, [1907] App. Ca. 220.

³Union Plate Glass Co., [1889] 42 Ch. D. 516.

⁴Oban and Aultmore Glenlivet Distillery, [1904] Court of Sess., 5 F. 1141.

⁵Barrow Hematite Steel Co. No. 2, [1900] 2 Ch. 846, and [1901] 2 Ch. 746. The same company had previously reduced its capital partly at the expense of the preference shareholders (see [1888] 39 Ch. D. 582).

⁶Victoria (Malaya) Rubber Estates, Limited, [1914] W. N. 307.

⁷Balmenach Glenlivet Distillery, [1907] Court of Sess., 8 F. 1135.

a proper case, although it affects the voting powers of the respective classes of shareholders,¹ or is part of a complete rearrangement of the capital² (as where the reduction falling on the ordinary shareholders the preference shareholders give up their preference), or otherwise affects the rights of various classes as regards each other,³ and even when the Articles contain no such powers it seems this will now be possible under Section 120 (see pages 24, 25, and 426, *supra*).

Rules relating to Reduction of Capital have been made, and those now in force are contained in Order 53B of the Rules of the Supreme Court. The official forms, together with additional forms in general use, are set out in Appendix L to the Rules of the Supreme Court. Under the Act and these Rules the following are the steps to be taken in making a reduction of the capital of a company limited by shares :—

1. Pass a special resolution reducing the capital of the company.
2. Confirm this special resolution.

If the reduction is only by cancellation of shares never taken or agreed to be taken, or is by return of accumulated profits, it is only necessary to register the special resolution, and in the latter case to register a Minute; but for all other reductions the sanction of "the Court" must be obtained on petition (Section 47). "The Court" is defined under Section 285 as meaning, in relation to a company, the Court having jurisdiction to wind up the company. The Courts having this jurisdiction are specified on page 464, *infra*. It is usual to apply in the Chancery Division of the High Court⁴ or of the County Palatine, and not in any of the County Courts, even in the case of small companies. The following are the necessary steps :—

3. Present a petition for an order confirming the reduction.
The petition and all documents relating to the proceedings will be intituled "In the Matter of the A. B. Company, Limited and Reduced, and in the Matter of The Companies (Consolidation) Act, 1908" (Section 47, and Rule 3 of Reduction of Capital Rules).
4. Apply *ex parte* by Summons in Chambers for directions as to the proceedings to be taken preliminary to the hearing of the petition or otherwise with reference thereto

¹ *Re James Colmer, Limited*, [1897] 1 Ch. 521.

² *Re National Dwellings Society*, [1898] 78 L. T. 144; *Hyderabad Deccan Co.* [1897] 75 L. T. 23.

³ *Credit Assurance and Guarantee Corporation*, [1902] 2 Ch. 601; *Allsopp & Sons*, [1903] 51 W. R. 644.

⁴ This business is done by all the Chancery Judges (see W. N. for 1892, page 81), and not only by those to whom the winding-up business is transferred (*Ocean Queen Steamship Co.*, [1893] 2 Ch. 606).

(Rule 4). When the reduction does not involve any diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid-up capital, the only direction required is as to publication of notice of the presentation of the petition, which must be made at such times and in such newspapers as the Judge shall direct.¹

Where any diminution of liability or any repayment of capital is involved, and in any other case if the Court so directs,¹ creditors are entitled to object (Section 49), and the Court must be satisfied on the hearing of the petition that with respect to every creditor entitled to object either his consent to the reduction has been obtained² or his debt or claim has been discharged or has been secured by setting apart and appropriating, in such manner as the Court may direct, a sufficient sum (Section 50),³ and accordingly paragraphs 5 to 10 given below apply, the Court having no power to dispense with the settling of a list of creditors, even though there is evidence that all the debts are paid.⁴

5. The words "and Reduced" must be used in the name of the company after the word "Limited" from the time of passing the special resolution until such time as the Court shall appoint (Section 48).
6. On the *ex parte* summons directions must be obtained as to settling the list of creditors entitled to object, and fixing a date for the same to be made up, and generally fixing the time for and giving directions as to all other steps to be taken (Rule 4 (2) (b)).
7. In accordance with the directions given, a list of the creditors of the company must be prepared and verified by affidavit. Notice of the preparation of the list of creditors and the place where it may be inspected, as well as of the amount of the proposed reduction of capital, must be advertised in such newspapers as the Judge shall direct, and after the expiration of the time fixed the Court will settle the list of creditors (Rule 9).

¹ The Court may under Section 49, Sub-section 1, allow a creditor to appear and object even in cases where there is no diminution of liability or repayment of capital, but will only do so if a strong case is made out on some special ground (*Meux's Brewery Co.*, [1919] 1 Ch. 28).

² Where debentures to bearer were outstanding and the names of the holders could not be ascertained the Court allowed the unanimous resolution of a meeting of debenture holders at which 87 per cent. of the issue was represented to suffice as equivalent to the consent of all (*Hydraulic Power and Smelting Co.*, [1914] 2 Ch. 187).

³ If the debt is admitted or proved and is an ascertained sum the whole amount must be set aside, and if the company refuses to do this sanction to the reduction will be refused (*Palace Billiard Rooms, Limited, v. City Property Corporation*, [1912] S. C. 5, Court of Sess. future rent).

⁴ *Re Lanson Store Service Co.*, [1895] 2 Ch. 726.

8. Notice of the proposed reduction and of the amount of the debt for which he is entered in the list must be sent by post to every creditor included in the list (Rule 8),¹ and the debts of any creditors who do not consent to the reduction of capital must either be paid or be secured in such manner as the Court may direct (Section 49, Sub-section 3).² An affidavit must be filed that this has been done, and particulars should be given of any claims made by alleged creditors, who may be ordered to prove their claims (Rules 10 and 11).
9. The certificate of the Master as to the settlement of the list of creditors must be obtained (Rule 13).
10. After the expiration of eight clear days from the filing of the Master's certificate the petition may be placed in the list for hearing (Rule 15). At such hearing those creditors whose debts have not been paid or secured may appear and oppose the reduction (Rule 17).

When the above proceedings are necessary, the time occupied in procuring the sanction of the Court is usually from six to twelve months.

If no diminution of liability or repayment of capital to the members is proposed, creditors are not entitled to object, and the words "and Reduced" need only be used from the date of presenting the petition. The Court may dispense altogether with their use, but usually requires them to be added for a period of one month,³ unless they have been used for a considerable time pending proceedings⁴ (Section 48), or there is evidence that the company would be prejudiced abroad by their use.⁵ The Court often allows an exception to be made exempting particular documents (*e.g.* labels on goods) from the use of the words.

The proceedings, other than those already mentioned, will be the same in all cases of reduction of capital.

11. The petition must be brought on for hearing after the due advertisement.

¹ In the case of debentures to bearer, where the holders' addresses are unknown, notice may be given by advertisement (*General Bank for the Promotion of Agriculture*, [1860] 38 L. J. Ch. 108).

² See note ³ on previous page.

³ Formerly the period varied from one to three months (*re Pimkney Steamship Co.*, [1892] 3 Ch. 125, *Monmouthshire Steel Co.*, [1906] W. N. 126). Now one month usually suffices, and very rarely is a shorter period allowed. In the case of a company doing business abroad, fourteen days was allowed in *Sanders, Renders & Co.*, [1919] W. N. 103.

⁴ *British and American Trustee Corporation v. Couper*, [1894] App. C'a. 407.

⁵ *Australian Estates Co.*, [1910] 1 Ch. at page 425.

12. If the Court sanctions the reduction, the Order and a Minute, approved by the Court, showing the particulars of the capital as reduced,¹ must be registered with the Registrar of Companies,² and notice of this registration must be published in such manner as the Court shall direct³ (Section 51 and Rule 20).
13. All future copies of the Memorandum of Association must contain the Minute mentioned above in lieu of the original statement of the capital of the company (Section 52).
14. The Court may require the company to publish the reasons for reduction, and the causes which led to it (Section 55), but rarely does so.⁴

A creditor entitled to object, who by reason of his ignorance of the proceedings has not been entered in the list of creditors, has certain rights reserved to him under Section 53, and it is a misdemeanour to conceal the name of a creditor entitled to object or the nature of his claim (Section 54).

At the hearing of the petition evidence must be at hand, by way of affidavit, explaining the cause of the intended reduction of capital, and giving particulars as to the financial position of the company. It was the practice to require strict proof of the loss of capital, but, having regard to a decision of the House of Lords in 1907,⁵ and the form of the Act, Neville, J., has held that evidence of loss of capital is not now essential.⁶ It is, however, still usual and proper to set out the facts in regard to loss of capital for the purpose of explaining to the Court the reason of the reduction. It will still be proper to show what

¹ For the form of the Minute where the scheme for reduction involves a reorganisation of capital see *Salinas of Mexico*, [1910] W. N. 311, *In re North Pole Ice Co.*, [1924] W. N. 131; as explained in *In re J. Dampney & Co.*, [1924] W. N. 200. The Minute must contain the denoting numbers of the shares where they are not all paid up to the same extent (*Solway Steamship Co.*, [1894] 61 L. T. 659). This will not be excused, but if the Minute is very complicated a shortened form of advertisement may be allowed (*Oceana Development Co.*, [1912] W. N. 121 and 138).

² The registration of the Order is conclusive as to the regularity of the proceedings, and a subsequent discovery of any irregularity will not invalidate the reduction: Section 51, Sub-section 4 (*Ladies' Dress Association v. Fulbrook*, [1900] 2 Q. B. 376; *Walker and Smith, Limited*, [1903] W. N. 82, 72 L. T. 572, 88 L. T. 792).

³ As to the form of Minute where capital in excess of the company's wants is returned see *re Calgary and Edmonton Co.*, [1906] 1 Ch. 141, *per* Buckley, J.; not followed by *Swinfen Eady, J., Warrington, J., or Parker, J.*, in *Lees Brook Spinning Co.*, [1906] 2 Ch. 394; *Anglo-Italian Bank*, [1906] W. N. 202, *General Industrial Syndicate*, [1907] W. N. 23.

⁴ It was done in *Truman, Hanbury, Buxton & Co.*, [1910] 2 Ch. 498, the loss having been very large and sudden.

⁵ *Poole v. National Bank of China*, [1907] App. Ca. 220.

⁶ *Louisiana Mortgage Co.* [1909] 2 Ch. 552.

reserve fund (if any) there is.¹ The affidavit must exhibit the Memorandum and Articles of Association, the Certificate of Incorporation of the company, and the Minute Book, containing the resolutions for the reduction of capital,² and usually also the last balance sheet. If fully paid shares have been issued, an affidavit that a contract was duly filed with the Registrar is necessary.²

Reduction of capital may be sanctioned or disallowed at the discretion of the Court, and accordingly any scheme which works unfairly as regards the interests of a minority may and will be disapproved³; but a fair scheme will be sanctioned, even if it effects an alteration of the respective rights of classes.⁴ It has been said that a scheme of reduction will not be allowed to pass if it is not for an object contemplated by the Acts, as, for instance, where the company has issued shares at a discount, and seeks to extinguish the remaining liability by writing down the capital⁵; or where the company has ceased to carry on business, and the only object is to divide the assets⁶; but this must be reconsidered in the light of the very wide view now taken of the objects of the Acts.⁷ For instance, where shares have been redeemed or paid off under circumstances of doubtful validity, the capital may be reduced with the sanction of the Court by cancelling the shares.⁸

Reduction may be allowed where the capital is represented by fully paid stock. In such a case every one pound of stock will be reduced to so many shillings of stock or to a proportionate part of the existing stock.⁹

A purported reduction, whereby founders' shares were to be extinguished and a greater number of ordinary shares issued in exchange, was held to be unlawful, being in reality an issue of the ordinary shares at a discount.¹⁰ The Court in Scotland refused to sanction a re-arrangement of capital whereby partly paid shares were converted into fully paid shares and the unissued capital

¹ In *Hoare & Co.*, [1901] 2 Ch. 208, before the *National Bank of China's* case, the reserve had been employed in the business, and the loss was treated as having fallen rateably on capital and reserve fund; and in the case of the *Barrow Hematite Steel Co. No. 2*, [1900] 2 Ch. 846, Cozens-Hardy, J., took goodwill into account.

² *Re Omnium Investment Co.*, [1895] 2 Ch. 127.

³ *Barrow Hematite Steel Co. No. 2*, [1900] 2 Ch. 846; affirmed on other grounds, [1901] 2 Ch. 746.

⁴ *Credit Assurance and Guarantee Corporation*, [1902] 2 Ch. 601.

⁵ *Re New Chile Gold Mining Co.*, [1888] 39 Ch. D. 475.

⁶ *Re Wallasey Brick Co.*, [1894] W. N. 20, 63 L. J. Ch. 415, 70 L. T. 870.

⁷ *Poole v. National Bank of China*, [1907] App. Ca. 229.

⁸ *Midland Railway Carriage Co.*, [1907] W. N. 175.

⁹ *House Property and Investment Co.*, [1912] 56 S. J. 505.

¹⁰ *Development Co. of Central and West Africa*, [1902] 1 Ch. 547.

was increased.¹ In both these cases there was in reality an increase of paid-up capital without any payment to the company.

When shares have been reduced they rank in a winding up only at the reduced amount; thus, where ordinary shares were reduced from a pound to a shilling each and there were large surplus assets after repaying the capital divisible among both classes, the ordinary shares only took one twentieth as much as the preference shares, which remained at a pound each.²

If the reduction of capital involves the repayment of money to the members, this creates a specialty debt, which can be recovered by the members entitled at any time within twenty years.³

Issuing shares at a discount and paying dividends out of capital are in fact reductions of capital, and it may be assumed that the Court will never sanction such proceedings. Buying the company's shares with its own capital or profits and forfeiting or accepting surrenders of shares are reductions of capital which in a proper case the Court will sanction.⁴

A reduction of capital cannot be effected as a scheme of arrangement under Section 120 unless the proper steps are also taken for the reduction under Sections 46 to 51.⁵

A Company Limited by Guarantee having a capital divided into shares registered since 1900 is subject to the same rules as a Company Limited by Shares (Section 56); but an Unlimited Company may reduce its capital without the sanction of the Court, and only need comply with the requirements of its own Articles of Association.

3. FORFEITURE, SURRENDER, AND DISCLAIMER OF SHARES.

A forfeiture or surrender of shares is in fact a reduction of capital, and the rule is that where the Articles do not authorise the surrender and forfeiture of shares, neither the directors nor a majority of the shareholders can without the sanction of the Court make a surrender or forfeiture valid⁶; but where there is a special authority to forfeit for nonpayment of calls, the directors, acting on behalf of the company, may, so long as they act within the terms of the authority, validly make a forfeiture

¹ Walker Steam Trawl Fishing Co., [1908] S. C. 123, Court of Sess.

² Espuela Land and Cattle Co. No. 2, [1909] 2 Ch. 189.

³ Artisans' Land and Mortgage Corporation, [1904] 1 Ch. 796.

⁴ British and American Trustee Corporation v. Couper, [1894] App. Ca. 399; *re* Denver Hotel Co., [1893] 1 Ch. 495; Dido Pier Co.'s Case, [1891] 2 Ch. 354.

⁵ Cooper, Cooper & Johnson, [1902] W. N. 109; White Pass and Yukon Railway, [1918] W. N. 323.

⁶ Munt's Case, [1856] 22 Beav. 55; Spackman v. Evans, [1868] L. R. 3 H. L. 171; Houldsworth v. Evans, [1868] L. R. 3 H. L. 263; Hart v. Clarke, [1858] 6 H. L. C. 633.

of the shares,¹ or accept a surrender in cases where the circumstances are such that they would have power to forfeit,² for Table A authorises forfeiture and has statutory authority. A forfeiture of shares for the nonpayment of debts other than calls is, however, an illegal reduction of capital, and if the Articles give a lien for the debt also offends against the rule forbidding a clog upon an equity of redemption.³

The same rule applies to the shares of persons who have agreed to become shareholders, but are not yet upon the Register.⁴ If there is a real dispute whether or not a person has agreed to become a shareholder, the directors may compromise the dispute, and allow the supposed shareholder to give up the shares.⁵

A clause in the Articles that on nonpayment the shares shall be *ipso facto* forfeited is ineffective until the directors declare the forfeiture.⁶

The directors must not, however, use the company's money to buy out shareholders with whom there is a quarrel, or who desire for any reason to retire, even if the Articles appear to authorise such a course⁷; but this may be made the subject of an arrangement, to which the sanction of the Court is obtained as for a reduction of capital⁸; and directors, or other members, may personally buy out shareholders, taking a transfer to themselves, and applying their own money to the purchase.⁹

A surrender of partly paid shares in consideration of a release by the company of the shareholder's liability constitutes a purchase by the company of those shares, and is therefore *ultra vires*; and even after the lapse of a long period the Court will restore to the Register the member who made the surrender¹⁰; and a surrender even of fully paid shares will not generally be lawful without the sanction of the Court, for this disturbs the equilibrium of the balance sheet and may render the payment of a dividend possible which otherwise would be unlawful.¹¹

As to a surrender of shares for the purpose of an exchange for shares of equal amount see page 31, *supra*.

¹ *Lane's Case*, [1882] 1 De G. J. & Sm. 504; *Kipling v. Todd*, [1878] 3 C. P. D. 350; *Tensdale's Case*, [1873] 9 Ch. 54.

² *Bellerby v. Rowland and Marwood's Steamship Co.*, [1902] 2 Ch. 14.

³ *Hopkinson v. Mortimer Harley & Co.*, [1917] 1 Ch. 646.

⁴ *Hall's Case*, [1870] 5 Ch. 707; *Snell's Case*, [1870] 5 Ch. 22; *London and Provincial Coal Co.*, [1877] 5 Ch. D. 525.

⁵ *Bath's Case*, [1878] 8 Ch. D. 334; *Dixon's Case*, [1870] L. R. 5 H. L. 606.

⁶ *Biggs's Case*, [1865] 1 Eq. 309; *Moore v. Rawlings*, [1859] 6 C. B. N. S. 289.

⁷ *Morgan's Case*, [1840] 1 Mac. & G. 225; *Trevor v. Whitworth*, [1888] 12 App. Ca. 409.

⁸ *British and American Trustee Corporation v. Conper*, [1894] App. Ca. 309.

⁹ *Per Lord Macnaghten in Trevor v. Whitworth*, [1888] 12 App. Ca. 436.

¹⁰ *Bellerby v. Rowland and Marwood's Steamship Co.*, [1902] 2 Ch. 14; *Anglo-French Exploration Co.*, [1902] 2 Ch. 845.

¹¹ *Re Denver Hotel Co.*, [1893] 1 Ch. 405.

Where a company had power to accept surrenders of fully paid shares, such a surrender, as part of a bargain that the former owner of the shares should purchase an onerous lease from the company, was held valid and not to require the sanction of the Court, unless the shares were also to be permanently extinguished¹ but the authority of this case is now doubtful.

In Scotland it has been held that where, as part of a compromise of claims by the company against promoters, the latter transferred deferred shares to the company to be held for the benefit of the preferred shareholders, this was a valid transaction, and the deferred shares were not extinguished, but any benefits arising from them belonged to the preferred shareholders.²

When a forfeiture is about to be made, the directors must see, first, that they have the power to forfeit, and, secondly, that they conform very strictly to all the preliminaries prescribed by the Articles.

A forfeiture of shares may be attacked from two sides—(A) If the shares subsequently turn out valuable, the original owner may seek to have them restored to him; (B) If there is a liability upon the shares, the creditors are interested to see that someone remains upon the Register to meet the liability. Accordingly, great exactness is required, for the Article authorising forfeiture will be construed strictly.³ Forfeiture must be preceded by all the proper notices, containing all the matters prescribed by the Articles, and giving all the time required⁴; but if the forfeiture is regular, the omission to inform the member,⁵ or to strike his name off the Register, will not invalidate it.⁶ If the notice claiming payment claims too much, a forfeiture based on such notice will be bad: *e.g.* if interest is claimed from too early a date.⁷ It must be carried out by properly qualified and appointed directors,⁸ and the due quorum must be present.⁹ Moreover, it must be for the cause intended by the Articles, and not with a view to getting rid of an obnoxious shareholder, or with a view to relieving the owner of the shares of his liability.¹⁰ In short, the power must be exercised alike for the benefit of the company

¹ *Re Denver Hotel Co.*, [1893] 1 Ch. 495.

² *Gill v. Arizona Copper Co.*, [1901] 2 F. 843, Court of Sess. A similar course was ultimately adopted in *Anglo-French Exploration Co.*, [1902] 2 Ch. 845.

³ *Clark v. Hart*, [1858] 6 H. L. C. 633.

⁴ See old Table A, Clauses 17 to 22; New Table A, Clauses 24 to 28.

⁵ *Knight's Case*, [1807] 2 Ch. 327.

⁶ *Lyster's Case*, [1807] 4 Eq. 233.

⁷ *Johnson v. Lyttle's Iron Agency*, [1877] 5 Ch. D. 687.

⁸ *Garden Gully United Quartz Mining Co. v. McLister*, [1875] 1 App. Ca. 39.

⁹ *Bottomley's Case*, [1881] 10 Ch. D. 681.

¹⁰ *Richmond and Painter's Case*, [1858] 4 K. & J. 305; *Spackman v. Evans*, [1894] L. R. 3 H. L. 171.

and with strict justice to the shareholder. A shareholder can obtain an injunction against an improper forfeiture,¹ or obtain damages.²

The power to forfeit and the power to accept surrenders are distinct, and the former will not justify a surrender being made which if made without express power will be invalid.³

If the shares are invalidly forfeited, the holder will remain a member of the company both as regards his liabilities and as regards his privileges, and the mere lapse of time will not cure the defect⁴; but where a shareholder has for a long period acquiesced in an irregular forfeiture he will not be allowed upon the company becoming prosperous to assert his right to have the forfeiture set aside⁵; and where a company had treated shares as forfeited, although proper notice had not been given to the member, it was held he could not be put on the list of contributories.⁶

It is usual for the Articles to contain a power for the directors to annul a forfeiture upon terms, and this power may be acted upon when desirable; but it is only possible to annul the forfeiture if the former owner of the shares consents.⁷ Another provision generally made is a declaration that the member remains liable for unpaid calls made before the forfeiture; and if this provision is found in the Articles, the former holder of shares which have been forfeited may be sued even after the forfeiture,⁸ but in the absence of such a clause he is freed from liability for past as well as future calls.⁹

A shareholder induced to take shares by fraud may, even after a forfeiture, repudiate the bargain and defend an action for calls,¹⁰ and where an action for rescission of the contract to take shares is pending the Court will, upon the plaintiff paying into court the amount of any calls made, restrain the company from forfeiting the shares until the hearing of the action.¹¹

¹ *Watson v. Eales*, [1856] 23 Beav. 294; *Johnson v. Lyttle's Iron Agency*, [1877] 5 Ch. D. 687.

² *New Chile Gold Mining Co. No. 2*, [1800] 45 Ch. D. 598. The right was enforced in the winding up.

³ *Hall's Case*, [1870] 5 Ch. 707; *Esparto Trading Co.*, [1879] 12 Ch. D. 191.

⁴ *Garden Gully United Quartz Mining Co. v. McLaster*, [1875] 1 App. Ca. 39; *Bottomley's Case*, [1881] 16 Ch. D. 681; *Esparto Trading Co.*, [1879] 12 Ch. D. 191; *Bellerby v. Rowland and Marwood's Steamship Co.*, [1902] 2 Ch. 14.

⁵ *Prendergast v. Turton*, [1883] 13 L. J. Ch. 268; *Rule v. Jewell*, [1881] 18 Ch. D. 660; *Jones v. North Vancouver Land Co.*, [1910] App. Ca. 317; *Palmer v. Moore*, [1900] App. Ca. 293.

⁶ *Webster's Case*, [1863] 32 L. J. Ch. 135. See also *Wollaston's Case*, [1850] 28 L. J. Ch. 721.

⁷ *Exchange Trust*, [1903] 1 Ch. 711. The new Table A has this power (Clause 27).

⁸ *Ladies' Dress Association v. Pulbrook*, [1901] 2 Q. B. at page 381; *Randt Gold Mining Co. v. Wainwright*, [1901] 1 Ch. 184.

⁹ *Stocken's Case*, [1868] 3 Ch. 415.

¹⁰ *Aaron's Reefs v. Twiss*, [1896] App. Ca. 273.

¹¹ *Lamb v. Sambas Rubber Co.*, [1908] 1 Ch. 845; *Jones v. Pacaya Rubber Co.*, [1911] 1 K. B. 455.

The company usually has power to reissue forfeited shares (e.g. under Clause 22 of the old Table A or Clause 27 of the new Table A), and on such reissue may treat them as paid up to any extent not exceeding the amount paid by the former holder: it may accept as consideration for such issue a sum less than that paid up before the forfeiture.¹ This is not an issue at a discount, for the company will, with what has already been received, be entitled to receive at least the nominal value of the shares. If in exercise of this power it reissues shares irregularly forfeited it may be liable in damages to the original holder.² When forfeited shares have been reissued the company may make a fresh call upon the new holders in respect of the amount remaining unpaid by the former holder upon which the forfeiture was made; but any payment made by the former owner, even after forfeiture, goes in reduction of the amount payable by the new owner.³

The power of forfeiture may be exercised by the directors after a voluntary winding up, if they obtain the sanction of the liquidator or of a meeting of the company.⁴

Where a shareholder or contributory is bankrupt his trustee may within twelve months after the first appointment of a trustee disclaim any shares which are subject to a liability,⁵ but the liquidator of an insolvent company has no similar power. If the trustee did not within one month after his appointment know of the shares he may disclaim at any time within twelve months after first becoming aware of them, and the Court may extend this time. The disclaimer determines the rights, interests, and liabilities of the bankrupt in the shares disclaimed, and discharges the trustee from personal liability as from the date when the shares were vested in him, but does not release joint holders or other persons interested. The company or any person interested may require the trustee to decide whether he will disclaim, and if for twenty-eight days he does not give notice of disclaimer he loses the right, unless the Court extends the time. If it is injured by the disclaimer (as would be the case if the shares are not fully paid) the company is a creditor of the bankrupt, and may prove in the bankruptcy for an amount representing the injury. The company can thus prove, if the bankrupt is sole holder, for the amount unpaid on the shares, giving credit, however, for their value, for they by the

¹ *Morrison v. Trustees and Executors Corporation*, [1898] W. N. 154, 68 L. J. Ch. 11, 79 L. T. 905; *Ramwell's Case*, [1881] 20 W. R. 882.

² *New Chile Gold Mining Co.*, [1890] 45 Ch. D. 598.

³ *New Balks Erstelling v. Raudt Gold Mining Co.*, [1904] App. Cas. 105; *re Randt Gold Mining Co.*, [1904] 2 Ch. 468.

⁴ *Ladd's Case*, *Fairburn Engineering Co.*, [1893] 3 Ch. 450.

⁵ Bankruptcy Act, 1914 (Section 54, Sub-section 1).

disclaimer become vested in the company.¹ Neither the bankrupt nor the trustee should be put on the list of contributories.² If other persons are interested in the shares (as mortgagees or joint holders) they can obtain a declaration from the Court vesting them in such persons.

4. CONSOLIDATION OF SHARES INTO SHARES OF LARGER AMOUNT AND CONVERSION OF SHARES INTO STOCK.

"If so authorised by its Articles," a Company Limited by Shares may consolidate and divide all or any of its share capital into shares of larger amount than its existing shares, or convert all or any of its paid-up shares into stock, and may subsequently reconvert such stock into paid-up shares, and thereafter every copy of the Memorandum must be in accordance with the alteration (Section 41). Notice of any such consolidation or conversion or of any reconversion must be given to the Registrar of Companies (Section 42) on the proper form, impressed with a five-shilling fee stamp.

It is often convenient when a reduction of capital has created shares not consisting of an integral amount of pounds to consolidate such shares and then subdivide the resulting shares into shares of one pound each, *e.g.* when shares of twelve shillings and sixpence have resulted from a reduction of capital, eight of such shares may be consolidated into one share of five pounds and the resulting share subdivided into five shares of one pound. There is no objection to doing this by a single resolution.³

Section 45 also gives certain powers for consolidating shares of different classes, which are discussed at page 26, *supra*.

Stock is "simply a set of shares put together in a bundle."⁴ It is in fact the holding of the stockholder expressed in pounds instead of in so many shares of so much each. Unless forbidden by the Articles any fraction may be transferred, but it is usual to provide that fractions of a pound shall not be capable of transfer.

It should be noted that a company cannot make an original issue of stock.⁵ If it desires to have a capital held as stock it must first issue shares, and when they are fully paid convert them into stock; but the omission to go through this formality is only an irregularity, and, at any rate, after a considerable lapse of time, stockholders who have paid the full amount of their stock are entitled to be treated as if shares had been issued and fully

¹ *Re Hallet, ex parte National Insurance Corporation*, [1894] 1 Mans. 380.

² *Re West of England Bank, ex parte Budden*, [1870] 12 Ch. D. 288.

³ *North Cheshire Brewery Co.*, [1920] W. N. 140.

⁴ *Morrice v. Aylmer*, [1875] L. R. 7 H. L. 725.

⁵ *Home and Foreign Investment Co.*, [1912] 1 Ch. 72.

paid.¹ Stock not fully paid is wholly unlawful, and confers no rights on the holders; they may be entitled to claim as creditors for the amount they have paid,² but any such right will be barred after six years by the Statute of Limitations.¹ An issue of bonus stock on conversion is unlawful and confers no rights; but the holders are not contributories, for they never agreed to take any shares.¹ Shares not fully paid cannot be converted into stock.

A Company Limited by Guarantee having a capital divided into shares registered since the 31st December, 1900, must state its capital in its Memorandum, but has not these powers of consolidation and conversion into stock.

A power in a will to invest in preference stock does not authorise an investment in preference shares.³

5. SUBDIVISION OF SHARES.

In cases where the capital of the company is divided into shares of a large amount, it is sometimes considered desirable to subdivide them into shares of smaller amount, as, for example, each share of a hundred pounds into ten shares of ten pounds each, or each share of ten pounds into ten shares of one pound each. Section 41 allows a Company Limited by Shares to do this by special resolution, if the company is so authorised by its Articles. If, therefore, power to pass such a resolution is not contained in the Articles, two special resolutions will be required—one taking power, “by special resolution,” to subdivide; the other acting upon that power.

It is no objection to a resolution that it contains a number of different alterations, *e.g.* consolidates a number of shares into shares of larger amount, and then subdivides the resulting shares into shares of smaller denomination, and at the same time carries out other portions of a scheme of reorganisation.⁴

The statement of capital in every copy of the Memorandum of Association issued after the passing of the special resolution must be in accordance with the resolution, and a penalty of one pound for each copy attaches to default in this respect (Sub-section 3).

Where a testator gave twenty-five shares in a company to a legatee, and at the time he made his will these were shares of £50 each, but they were subdivided before his death into shares of £10 each, the legatee got only twenty-five of the subdivided shares.⁵

¹ Home and Foreign Investment Co., [1912] 1 Ch. 72.

² *Albon's Case*, [1873] 15 Eq. 394, 9 Ch. 1.

³ *Re Willis, Spencer v. Willis*, [1911] 2 Ch. 563.

⁴ North Cheshire Brewery Co., [1920] W. N. 140.

⁵ *Inghis v. Gillins*, [1909] 1 Ch. 345.

The Act prescribes that on a subdivision of shares the amount paid on the original shares shall be equally apportioned to the shares of reduced amount, but as part of a scheme sanctioned as a reduction of capital under Section 46, Sub-section 1 (a), a company was allowed to divide shares of £500 each, on which £185 was paid up, into three shares of £100 each, with £38 6s. 8d. unpaid, and two shares of £100, wholly unpaid, and to cancel the last-mentioned two shares.¹

Section 45 also gives certain powers for the division of shares into shares of different classes, which are discussed at pages 25 and 26, *supra*.

A Company Limited by Guarantee registered since the 31st December, 1900, must state its capital in its Memorandum, and, as this is unalterable except within the limits expressly allowed by the Act, the company has no power to subdivide its shares, that power only being given by the Act to Companies Limited by Shares.

REORGANISATION OF EXISTING COMPANIES.

Under The Companies Act, 1862, when once a company was registered there was very little opportunity for re-arranging its capital, taking new powers, or compromising with its creditors. The capital might be increased, shares might be consolidated into shares of greater amount, and shares might be converted into stock; but a reduction of capital or a subdivision of shares was not authorised, nor could the rights of creditors or of preferred shareholders be affected. By the Acts of 1867 and 1877 power was given to reduce capital and to subdivide shares, and under The Joint Stock Companies Arrangement Act, 1870, arrangements could be effected with creditors, but only in a liquidation. In these circumstances it became a practice when an extensive reorganisation was desired to put the company into liquidation and to sell all its assets and undertaking to a new company, taking advantage of Section 161 of the Act of 1862 (now Section 192 of the Act of 1908) to secure that the shareholders of the old company should accept shares in the new company, and of The Joint Stock Companies Arrangement Act, 1870, to bind creditors to accept the new company as its debtor. The procedure in such a reconstruction is described in Book III, Chapter V, under the heading "RECONSTRUCTION OF A COMPANY" (see page 620 *infra*). Such a proceeding was costly, involving the registration of a new company, with the necessary duty and fees, and the transfer of all the assets and payment thereon of stamp duty at the rate of ten shillings per cent. on the consideration for practically everything

¹ *Doloswella Rubber Estates*, [1917] 1 Ch. 213.

except stock-in-trade and other goods, wares, and merchandise. With the increase of the conveyance duty (in 1910) to one pound per cent., and of the capital duty (in 1920) to a like amount, the cost of a reconstruction by way of liquidation has become too heavy; but, in the meantime, new powers have been given to an existing company to reorganise its affairs, and it is now more usual to make use of these powers and reorganise without going into liquidation.

The powers for this purpose are to be found in the Act of 1908 as follows:—

Section 9 authorises, within certain limits, alterations in the objects clause of the Memorandum of Association (see page 38, *supra*).

Section 41 authorises—

- (1) An increase of capital (see page 420, *supra*).
- (2) A consolidation of shares (see page 439, *supra*).
- (3) A conversion of paid-up shares into stock, and a reconversion of stock into shares (see page 439, *supra*).
- (4) A subdivision of shares into shares of smaller amount (see page 440, *supra*).
- (5) The cancellation of unissued shares (see page 424, *supra*).

Sections 46 to 56 authorise a reduction of capital (see pages 424 to 434, *supra*).

Section 120 authorises a company, whether in liquidation or not, to effect compromises or arrangements not only with its creditors or any class of creditors but also with its members or any class of members (see page 24, *supra*, and page 630, *infra*), while Section 45 gives certain limited powers of dealing with capital, and the rights of preference shareholders (see page 25, *supra*) which are not very important, seeing that much wider and more general powers are given by Section 120.

It is obvious that a reorganisation under these powers has many advantages beyond the saving in expense when compared with a liquidation and re-sale. For instance, in many cases leases and concessions are forfeitable in case of a winding up of the Company, and in every case it is inconvenient to have a break in the continuity of the business with a possible cancelling of contracts; but there is one respect in which a reconstruction by liquidation was valuable, namely, in enabling the company to sell for partly paid shares so that those who took them became liable for calls and so provided the company with fresh capital. There

is no reported case to the effect that on a reorganisation under Section 120 the shareholders cannot be called upon to take a further liability in respect of their shares, but so deeply rooted is the principle that in a limited company no member can be called upon to pay more than the amount of his share, that it is highly improbable that the Court will sanction a scheme which imposes a further liability upon the shareholders, and it will be remembered that whether for a reduction of capital or a compromise under Section 120 the sanction of the Court is necessary. If further capital is required it is accordingly necessary to take power to create some very favourable class of debentures or shares (such as prior lien debentures or preference shares carrying a high rate of interest or dividend) which will be sufficiently attractive to the investor to procure the subscription of the required new capital.

The various steps for reorganising the capital and business can be taken at one and the same time and by a single resolution,¹ but it is usual to include in the scheme a term that the whole is to be dependent upon the sanction of the Court being given to such parts as require such sanction.

It is not necessary here to repeat the detailed requirements for each step in the reorganisation, which will be found under the various headings referred to above. Every part of the scheme must be carried out with due regard to the provisions of the Act affecting that part: *e.g.* if a reduction of capital is to be effected all the steps required by Sections 46 to 56² must be taken, and the necessary sanctions obtained and advertisements published, and in every case the necessary meetings must be held and the required majorities obtained.

The forms of schemes of arrangement are very various. A specimen will suffice here.

A Company is in financial difficulties, having a capital of £500,000, divided into 300,000 ordinary shares and 200,000 preference shares of one pound each, and having made issues of first and second mortgage debentures of £150,000 and £100,000 respectively, the former specifically charged on the "A" factory and works and generally upon all the assets, the latter having a specific first mortgage on the "B" factory which was acquired with the proceeds of the issue, and having, subject to the first debentures, a floating charge on all the other assets of the company. The interest on the debentures is in arrear, receivers have been appointed by the Court in actions commenced on behalf of each class of debenture holders, and, in addition, the debts owing to unsecured

¹ North Cheshire Brewery Company, [1920] W. N. 149.

² Cooper, Cooper & Johnson, [1902] W. N. 199; White Pass and Yukon Railway Co., [1918] W. N. 323.

creditors amount to over £60,000. Negotiations take place between the company and representatives of each class of debenture holders and creditors, and between committees of the ordinary shareholders and preference shareholders, and a scheme of arrangement is agreed by which it is determined to proceed in the following manner:—

- (1) Reduce the capital to £180,000, by writing eighteen shillings per share off each of the ordinary shares and five shillings per share off each of the preference shares, leaving 300,000 ordinary shares of two shillings each and 200,000 preference shares of fifteen shillings each.
- (2) Consolidate every ten ordinary shares of two shillings into one new share of one pound and every four preference shares of fifteen shillings into one new share of three pounds each, and subdivide each of these new three pound shares into three new shares of one pound each.
- (3) Unify the 180,000 shares of one pound each resulting from the foregoing proceeding into one class of shares all ranking equally and to be called ordinary shares.
- (4) Increase the capital by £70,000 by the creation of 70,000 new preference shares of one pound each entitled to a cumulative preferential dividend of eight per cent. and entitled in a winding up to repayment of capital before any payment is made to the ordinary shareholders, but not further to participate in the profits or capital of the company.
- (5) Create £100,000 prior lien mortgage debenture stock constituting a first charge on all the assets of the company, and £125,000 "A" debenture stock entitled to a second charge on the assets, and £145,000 "B" debenture stock entitled to a third charge on the assets, specifying the rate of interest and other rights attaching to each class of debenture stock.
- (6) Declare that the company may issue the prior lien debenture stock to raise fresh working capital and to pay the costs of the debenture holders' actions and of the scheme.
- (7) Declare that the "A" and "B" debenture stock shall be issued to the holders of the existing first and second mortgage debentures, so that the "A" debenture stock is issued to the holders of the first debentures in proportion to the value of the assets on which they have a first charge (*i.e.* all the assets except factory "B"), and to the holders of second debentures in proportion to the value of the assets on which they have a specific first

mortgage (these amounts having been previously ascertained by valuation and agreed), and that the "B" debenture stock is issued to the holders of the first and second debentures in proportion to the amounts secured by such debentures respectively for principal and interest in arrear, so far as the same are not satisfied by the issue of "A" debenture stock as above mentioned.

- (8) Declare that the amounts owing to the unsecured creditors of the company shall be satisfied by the issue to them of fully paid new preference shares at par.
- (9) Direct that application shall be made in each of the debenture holders' actions that the receivers shall be discharged and all proceedings stayed, costs being paid by the company out of the proceeds of the issue of the prior lien debenture stock.

This scheme will result in the company having power to raise £100,000 by the issue of prior lien debenture stock, in the rights of the existing debentures of each class being re-arranged and the arrears of interest funded, in the unsecured creditors having their debts converted into fully paid preference shares of the new issue, and in the old share capital of £200,000 in preference shares and £300,000 in ordinary shares being reduced and unified into a single share issue of £180,000 in ordinary shares.

The reduction of capital will require a special resolution and the sanction of the Court, under Section 46. It will be necessary to alter the Articles declaring the rights of the preference and ordinary shareholders by special resolution, and to obtain the consent of the preference shareholders by a resolution under Section 45 if their rights are determined by the Memorandum of Association without a power of variation, but if not so determined either by resort to the powers contained in the Articles, or if those do not suffice by proceedings under Section 120. Meetings and resolutions of the holders of the first mortgage debenture holders, of the second mortgage debenture holders, and of the unsecured creditors must be held separately under Section 120, and the whole scheme requires confirmation by the Court under Sections 45, 46, and 120. This can be obtained by a single application on which all the parties interested can appear.

It may be suggested that the original ordinary shares should be wiped out altogether, but it is usually found desirable to leave them a small interest to secure their support to the scheme and their assistance in subscribing to the new prior lien debenture stock.

CHAPTER VII.

MISCELLANEOUS MATTERS.

ANNUAL RETURNS OF CAPITAL AND MEMBERS.

EVERY company having a share capital is required to make, once at least in every year,¹ a List of all persons who were members of the company on the fourteenth day after the first or only ordinary general meeting in the year, and a List of all persons who have ceased to be members since the date of the last Return or (in the case of the first Return) of the incorporation of the company. The List must state the names, addresses, and occupations of all the past and present members of the company therein mentioned, and the number of shares held by each of the existing members at the date of the Return, specifying shares transferred since the date of the last Return and the dates of registration of the transfers (Section 26, Sub-section 1).

The List must be accompanied (Section 26, Sub-section 1) by a Summary distinguishing between shares issued for cash and shares issued as fully or partly paid up otherwise than in cash, and specifying the following particulars:—

- (a) The amount of the share capital of the company and the number of the shares into which it is divided;
- (b) The number of shares taken from the commencement of the company up to the date of the Return;
- (c) The amount called up on each share;
- (d) The total amount of calls received;
- (e) The total amount of calls unpaid;
- (f) The total amount of the sums (if any) paid by way of commission in respect of any shares or debentures, or allowed by way of discount in respect of any debentures, since the date of the last Return;
- (g) The total number of shares forfeited;
- (h) The total amount of shares or stock for which share warrants are outstanding at the date of the Return;
- (i) The total amount of share warrants issued and surrendered respectively since the date of the last Return;

¹ This is in addition to the Return which has to be made within one month after each allotment of shares (see page 182, *supra*). "Every year" means every calendar year; i.e. from the 1st January to the 31st December inclusive (*Gibson v. Barton*, [1875] L. R. 10 Q. B. 329; *Edmunds v. Foster*, [1875] 33 L. T. 690).

- (k) The number of shares or amount of stock comprised in each share warrant;
- (l) The names and addresses of the persons who at the date of the Return are the directors of the company, or occupy the position of directors, by whatever name called, including the name and address of any person (which will include company or corporation) in accordance with whose directions or instructions the directors of the company are accustomed to act (Companies (Particulars as to Directors) Act, 1917), see page 295 *et seq.*, *supra*); and
- (m) The total amount of debt due from the company in respect of all mortgages and charges which are required (or, in the case of a company registered in Scotland, which, if the company had been registered in England, would be required) to be registered with the Registrar of Companies under the Act, or which would have been required so to be registered if created after the 1st July, 1908.¹

The Summary of a public company must also include a statement in the form of a balance sheet as described on page 398, *supra* (Section 26, Sub-section 3), from which requirement a private company is exempt.

The List and Summary must be signed by the manager or secretary of the company (Sub-section 4).

In the case of a private company there must also be filed a certificate signed by a director or the secretary that the company has not issued any invitation to the public to subscribe for shares or debentures of the company, and where the List of Members of the company shows that their number exceeds fifty also a certificate showing that the excess consists wholly of employés or ex-employés as authorised by Section 121, as amended by Section 1, Sub-section 2, of the Act of 1913² (see page 453, *infra*).

The above-mentioned particulars have to be entered in a separate part of the Register of Members, made up to the fourteenth day after the ordinary general meeting, and the entry completed within the next seven days, and a copy forthwith filed with the Registrar of Companies (Sub-section 4). Where there is more than one ordinary general meeting in the year the above entries have to be made up to the fourteenth day after the first of such meetings. The same particulars are required to

¹ As to these see page 271, *supra*. It will be observed that there may be mortgages and charges which were created before the 1st January, 1901, and therefore do not require registration, or which, created between the 31st December, 1900, and the 1st July, 1908, did not require registration under the Act of 1900, but would require registration if now created. All these must be included in the Return.

² The Companies Act, 1913, Section 1, Sub-section 3.

be entered after the first or statutory general meeting where such meeting is an ordinary general meeting.¹ If default is made in holding the general meeting in any year the Return cannot be made so as to comply with the Act, and the penalties mentioned on the following page are incurred, as well as penalties for not holding the meeting.²

The "Annual Return," or copy of the above entries, must be written upon the authorised forms, impressed with a five-shilling fee stamp, and registered within the seven days mentioned above, or, in other words, within twenty-one days after the first ordinary general meeting in each year. Any company neglecting to make this Return "shall be liable to a fine not exceeding five pounds for every day during which the default continues, and every director and manager of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty" (Sub-section 5). In making out the Return care should be taken that it does not contain any notice of trust, "expressed, implied, or constructive," contrary to Section 27, or it will be refused by the Registrar. It should be observed that the Return has to be made up to the *fourteenth day after the first ordinary general meeting*—not to the 30th of June or the 31st of December, or to the end of the company's financial year.

In addition to the risk of penalties incurred by a company neglecting to make its Annual Returns, there is the danger that the Registrar may treat the omission as being reasonable cause for belief that the company is not carrying on business or in operation, and, after certain formalities, removing its name from the Register of Companies under Section 242. A company's name can only be restored to the Register by an Order of Court, to obtain which involves considerable expense (see "ABORTIVE AND DEFUNCT COMPANIES," page 618, *infra*).

Every year large numbers of companies are thus struck off the Register, sometimes with serious results to share and debenture holders. The Board of Trade also institutes proceedings and frequently obtains convictions in cases of default in making Annual and other Returns, the penalties and costs ranging from six or seven pounds to considerably over a hundred pounds.

All registered companies having a share capital must comply with the requirements of the sections mentioned above, whether incorporated under the Consolidation Act or any previous Act.

¹ The Registrar takes the view that the statutory general meeting is not an ordinary general meeting, and that consequently no return is required in respect of such meeting. This view appears to be in conflict with Table A, Clauses 45 and 47.

² *Gibson v. Barton*, [1875] L. R. 10 Q. B. 339; *Park v. Lawton*, [1911] 1 K. B. 598.

Life Assurance Companies are under divers special requirements under The Assurance Companies Act, 1909, and those complying with these requirements are exempt from the provisions of Section 108 mentioned below (see Sub-section 6 of Section 108).

By Section 108 every company being a limited banking company or an insurance company (save as before stated), or a deposit, provident, or benefit society, must before it commences business, and on the first Monday in February and the first Tuesday in August in every year, make a statement in the Form C in the First Schedule to the Act, and display a copy in a conspicuous place in the registered office, and in every branch office or place of business, and every member or creditor is entitled to a copy on payment of sixpence.

Banking companies registered under the Companies Acts may, by appending to their Annual Returns a statement of the several places where they carry on business, with the counties in which they are situate, be relieved from the duty of rendering to the Commissioners of Inland Revenue the Returns of their shareholders and officers required at the commencement of each year under the various Acts affecting banks and bankers (Revenue, Friendly Societies, and National Debt Act, 1882, Section 11).

As to the penalty for wilfully making a statement false in a material particular, knowing it to be false, see Section 281 and The Perjury Act, 1911, Section 5.

CARRYING ON BUSINESS WITH LESS THAN THE MINIMUM NUMBER OF MEMBERS.

Every member of a public company carrying on business for more than six months after the number of members has been reduced below seven, or in the case of a private company below two,¹ becomes severally liable for the whole of the debts of the company contracted during the time it so carries on business after the six months, if cognisant of the fact that the number has been reduced below the minimum allowed, and may be sued for the same without the joinder in the action or suit of any other member (Section 115). The company may also be wound up by the Court (Section 129). For the purpose of these sections it would seem that past members and persons who are representatives of deceased members must not be counted.²

¹ By The Companies Act, 1913, a private company failing to comply with the special provisions constituting it a private company loses the benefit of the provision entitling it to carry on business with less than seven members, and Sections 115 and 129 apply as if it were a public company.

² Compare *Bowling and Welby's Contract*, [1896] 1 Ch. 663.

PENALTIES.

The cases in which penalties are imposed are very numerous. They are referred to throughout this book in connection with the subject-matter to which they relate. By Section 276 all offences under the Act made punishable by any fine may be prosecuted under the Summary Jurisdiction Acts: *i.e.* by Police Court proceedings. The penalties may be heavy: for instance, in 1908, at the Westminster Police Court, a company was fined £1 a day for 155 days for neglecting to file the Annual Returns; and in 1909, at the same Court, a company and its sole director were fined £50 each and costs for not having the company's name displayed in a conspicuous position outside its office. More recently fines ranging from £5 to £700 have been imposed.

Section 276 also contains a list of cases in which the prosecutions in Scotland must be at the instance of the Lord Advocate or a procurator fiscal as the Lord Advocate may direct.

Criminal offences are dealt with by Sections 216 and 281 of the Act of 1908, Sections 81 to 84 of The Larceny Act, 1861 and Section 5 of The Perjury Act, 1911 (see page 612, *infra*). Various provisions of The Forgery Act, 1913, apply to matters relating to companies.

REGISTRATION OF EXISTING COMPANIES UNDER PART VII. OF THE ACT, AND APPLICATION OF THE ACT TO EXISTING COMPANIES.

By Part VII. of the Act the regulations under which existing companies may register are laid down. By Section 249 it is declared that any company consisting of seven or more members in existence on the 2nd November, 1862, including companies registered under the Acts of 1856 and 1857, and any company consisting of seven or more members formed after that date in pursuance of any Act of Parliament or of letters patent, or being a company within the Statutaries, or being otherwise duly constituted by law, may at any time register under the Act as unlimited or limited by shares, or limited by guarantee,¹ and the registration is valid, although only for the purpose of the company being wound up. A company having the liability of its members limited by Act of Parliament or letters patent may not register as unlimited or limited by guarantee, nor can it register at all unless it is a Joint Stock Company: that is to say, unless it has a permanent paid-up or nominal share capital of fixed amount divided into shares or stock, and so formed that only shareholders or stockholders can be members; nor can any other company that is not a Joint Stock Company as above defined register as a company limited by

¹ When registered with limited liability the word "Limited" must be the last word of the name (Section 258).

shares; and in the case of every company applying for registration the assent of a majority of the members present at a general meeting summoned for the purpose is required, which in the case of a company the liability of whose members is not already limited by Act of Parliament or letters patent applying for registration as a limited company must be a three fourths majority. Further, in the case of a company applying for registration as a company limited by guarantee a resolution is required accepting the liability involved in the guarantee.

Companies already registered under the Act of 1862 may not re-register under this Act (Section 249, Sub-section 4); but the Act applies to all companies formed and registered under The Joint Stock Companies Acts, 1856 and 1857, or under The Companies Act, 1862 (Sections 245 and 285), and to all companies registered but not formed under those Acts (Section 246), and to unlimited companies registered as limited under the Act of 1879 (Section 247); in all these cases any reference in this Act to the date of registration being read as referring to the date of registration under those Acts respectively. A company registered under the Act of 1856 or 1857 may cause its shares to be transferred in the manner hitherto in use, or in such other manner as the company may direct (Section 248).

If a bank of issue registers under the Act as a limited company it does not acquire limited liability in respect of its notes, and if in a winding up the assets are insufficient to satisfy all creditors the members are liable to make good to the general assets any amounts applied thereout in satisfying note-holders (Section 251).

Before registration there must be furnished to the Registrar—

1. A list showing the names, addresses, and occupations of the members, with the shares or stock held by them respectively, distinguishing each share by its number.
2. A copy of the Act, Royal Charter, Letters Patent, Deed of Settlement, Contract of Copartnery, Cost Book Regulations, or other instrument constituting or regulating the company.
3. If the company is to be a limited company a statement of the nominal share capital and the number of shares or amount of stock of which it consists, and the number of shares taken and the amount paid on each share, with the name of the company, including the word "limited" as the last word thereof, and in the case of a company limited by guarantee the resolution declaring the amount of the guarantee (Sections 252 and 253).

The foregoing particulars must be verified by a statutory declaration by two or more directors or other principal officers (Section 254), and the Registrar may require further evidence (Section 255).

No fees are chargeable for registration if the company is not registered as a limited company, or if it was already limited by Act of Parliament or Letters Patent (Section 257). The fees payable in other cases are specified in Table B in the First Schedule, and on payment of these and compliance with the requirements of the Act the Registrar issues a Certificate of Incorporation, which has the same effect as upon a registration under Part I. of the Act (Section 259).

Upon registration all property, real and personal (including things in action), of the company passes to and vests in the company as incorporated by the Act (Section 260), the rights and liabilities of the company remain unaffected (Section 261), and all actions and other legal proceedings against the company or its public officer, or any member, may be continued, but execution may not issue against an individual member. If the property of the company is insufficient to satisfy any judgment or order, an order may be obtained for winding up the company (Section 262).

The Act of Parliament or other instrument constituting or regulating the company continues to be the conditions and regulations of the company as if contained in its Memorandum and Articles of Association respectively (Section 263), or a Memorandum and Articles may be substituted for the Deed of Settlement (Section 264), and the provisions of the Act apply to the company as if formed under the Act, with certain exceptions (Section 263, Sub-sections ii. to v.).

Before 1890 it was not uncommon for partnerships to form themselves into what were called "Companies at Common Law," and then to register themselves under the Companies Acts, and thus obtain limited liability. But all applications from companies which were not in existence before 1862, unless they have been formed under some Act of Parliament or Royal Charter, have since 1890 been rejected.¹

In the case of companies formed privately after 1862, to which Certificates of Incorporation were issued before 1891, reliance can be placed upon Section 17, Sub-section 1, which declares that "a Certificate of Incorporation given by the Registrar in respect of any association shall be conclusive evidence that all the requirements of this Act in respect of registration and

¹ Reg. v. Registrar of Joint Stock Companies, [1891] 2 Q. B. 598.

of matters precedent and incidental thereto have been complied with and that the association is a company authorised to be registered and duly registered under this Act"; but Kekewich, J., has held that such a registration was not sufficient to vest in the company, under Section 193 of the Act of 1862, property owned by the partnership before registration, but that a title could be obtained by possession under the Statutes of Limitation.¹

There are still a few old companies in existence which have not become incorporated under the Companies Acts. These are mainly gas and water companies, constituted by Deed of Settlement or similar instrument prior to 1856. After the passing of the Joint Stock Companies Act of that year most of them became incorporated under it, but some have not yet re-registered.

In most cases also many of the provisions of the Deed of Settlement have, through alterations in company law and practice, become obsolete and inapplicable. To overcome this defect re-registration is very desirable, as by that means the power of rescinding the Deed may be obtained, except so far as the expressed objects of the company are concerned, and entirely new regulations in accordance with present needs may be adopted under Section 13 of the Consolidation Act.

PRIVATE COMPANIES.

Prior to the passing of the Act of 1900 all companies were treated alike, and the expression "Private Company" could only have any meaning as describing the practice of the persons interested. By the Act of 1900 a distinction was drawn between those companies which did and those which did not offer their shares to the public for subscription, and to some extent the words "Private Company" were used to denote those companies which did not offer their shares to the public. Experience soon showed that the original members of many companies which did not in the first instance make a public issue soon began to distribute their holdings by means of sales on the Stock Exchange or otherwise, and in such cases the companies became to all intents and purposes Public Companies, while the public had not the protection supposed to be afforded to them by the requirements of the Act of 1900 that very full information should be given in the prospectus, and that such prospectus should be filed. The Consolidation Act of 1908 goes further than the Act of 1900 in enforcing publicity, and requires companies which do not issue a prospectus to file a "statement in lieu of prospectus" with the Registrar of Companies, and both those

¹ *Re Cussons, Limited*, [1904] 73 L. J. Ch. 296.

companies which do and those which do not issue a prospectus to file an annual balance sheet; but it was recognised that this publicity might not be entirely appropriate in the case of really private companies, and a distinction was accordingly drawn between private and other companies, and, for the first time, a formal discrimination was made.

By Section 121 a Private Company¹ is defined as one which by its Articles—(a) Restricts the right to transfer its shares; (b) Limits the number of its members (exclusive of persons who are or have been in the employment of the company²) to fifty; and (c) Prohibits any invitation to the public to subscribe for any shares or debentures of the company; with a proviso in Sub-section 3 that joint holders of shares shall, for the purposes of the section, be treated as a single member. As regards (a) it would seem that almost any restriction affecting the whole of the shares will suffice, and that even the common-form clause giving the directors power to reject transfers to persons whom they do not approve will satisfy the Act; and as regards all the conditions until the Act of 1913 they were satisfied by the insertion of restrictive provisions in the Articles, whether such provisions were or were not observed in practice, it having been held that no penalty could be enforced for failing to observe them, as, for instance, when the number of members was allowed to exceed fifty.³ Since this decision The Companies Act, 1913, has been passed, enacting that if the company makes default in complying with these provisions of its Articles it loses the benefit of the exemptions conferred by Section 26, Sub-section 3, and Sections 114 and 115 (see page 455, *infra*), and may be wound up if its number of members is less than seven. The same Act requires every Private Company to send with its Annual List of Members a certificate, signed by a director or the secretary, that the company has not issued any invitation to the public to subscribe for shares or debentures, and where the List of Members shows that their number exceeds fifty a similar certificate, showing that the excess consists wholly of persons who may lawfully be excluded in reckoning the number of fifty. But the Court may relieve a company in case of an accidental failure to comply with the Articles, or where on other grounds it is just to grant relief.

¹ For the purposes of the Apportionment Act a company which is a Private Company under the Companies Acts is still a Public Company (*Theobald v. White*, [1913] 1 Ch. 231).

² The Companies Act, 1913, amends Section 121, and allows the exclusion of persons "who are in the employment of the company and of persons who, having been formerly in the employment of the company, were while in such employment and have continued after the determination of such employment to be members of the company."

³ *Park v. Royalties Syndicate*, [1912] 1 K. B. 330.

Associations not for profit, companies limited by guarantee, and unlimited companies cannot be registered as Private Companies unless they have a share capital, for the Articles cannot comply with the provision requiring the right to transfer shares to be restricted.

There is no reason why an unlimited company having a share capital should not be a Private Company, and partnerships desiring to define their rights without seeking limitation of liability may avail themselves of registration. In such case it may be wise not to require any qualification for directors, as a proposed director might refuse to accept unlimited liability.

A company registered as a Private Company has several advantages. It may consist of *two* or more persons (Section 2), so that there is now no occasion for seven "dummies" to sign the Memorandum of Association of a newly formed private company, and the derision which was so often applied to "one man" companies has no point. Where there are only two members it is necessary to remember that on the death of one of them the same consequences follow as when in a Public Company the number of members is reduced below seven (see page 449, *supra*).

Private Companies are free from the obligations imposed upon companies which do not issue a prospectus to file a statement in lieu of it (Section 82: see page 119, *supra*). They are also relieved, by Section 26, Sub-section 3, from the necessity of filing an annual statement in the form of a balance sheet, and by Section 65, Sub-section 10, from forwarding to their members or filing the report prior to the statutory meeting required in the case of other companies by that section; and they are not subject to the provisions of Section 114 giving holders of preference shares and debentures the same right to receive and inspect balance sheets and the reports of auditors and other reports as is possessed by ordinary shareholders, although preference as well as other shareholders will still be entitled to inspect the auditors' report and to be furnished with copies of the balance sheet and auditors' report under Section 113, Sub-section 3.

They also escape from the provisions of Section 85 requiring a minimum subscription before allotment, and are entitled to commence business immediately on incorporation, for Section 87 does not apply (see Sub-section 6).

Section 72 (requiring directors named in the Articles to file a contract to take their qualification shares from the company if they have not signed the Memorandum of Association therefor) does not apply to Private Companies.

Private Companies, as well as Public Companies, can, it seems, pay a commission out of capital for underwriting their shares, but in such case must file with the Registrar a statement in the prescribed form, verified in like manner as a statement in lieu of prospectus (see page 159, *supra*).

The method of forming a Private Company is the same as in the case of a Public Company, save that not more than two persons are required to subscribe the Memorandum and Articles, and that the Articles must contain the provisions above referred to.

Existing companies which are in effect Private Companies may by altering their Articles become Private Companies under the Statute and so obtain the benefits above referred to, and a large number of such companies have done so.

If a Private Company desires to become a Public Company, it may do so, subject to anything contained in its Memorandum or Articles (Section 121, Sub-section 2), by passing a special resolution to that effect, and filing the statement in lieu of prospectus required by Section 82 in the case of other companies (see page 119, *supra*), and a statutory declaration such as is required by Section 87 in the case of other companies before commencing business (see page 167, *supra*). This involves the filing of a consent to act by the directors named in the statement, and a contract by them to take up their qualification shares, if any, unless they signed the Memorandum of Association therefor at the time of incorporation. However, it is not the practice to file all the documents mentioned in the case of every conversion, for the Registrar, whilst holding that the requirement as to the passing of a special resolution applies both to companies which have throughout their existence been private and to companies which have previously been public, considers that the other requirements of Sub-Section 2 of Section 121 apply only to companies which have not previously been public. It would seem that a Private Company, even if prohibited by its Articles from so converting itself into a Public Company, can first alter its Articles and then proceed with the conversion.

The recognition of Private Companies appears to be a wise step, and it will be seen that Limited Liability may now be obtained in any one of the following forms:—

1. Limited Partnerships under The Limited Partnerships Act, 1907 (which came into operation on the 1st January, 1908), in which case, however, there must always be at least one partner with unlimited liability.
2. Private Companies, which may consist of any two or more members (not exceeding fifty, as mentioned on

page 453, *supra*), whose liability (except in the case of unlimited companies) is strictly limited, and such companies are not required to file any prospectus, statement, or balance sheet.

3. Public Companies, consisting of not less than seven members, which must give publicity to their condition by filing a prospectus or statement in lieu thereof and an annual statement in the form of a balance sheet.

CONVERTING PRIVATE BUSINESSES INTO COMPANIES.

It frequently happens that the members of a private firm desire to turn their business into a company, although they do not propose to publish any prospectus or to invite the public to take shares. The advantages are obvious. The limitation of liability is of great importance to all, and can be extended to all the partners, and not, as in the case of limited partnerships, only to sleeping partners; while, in addition, persons willing to lend money to the concern can be secured by debentures charged on the property, and persons willing to risk a certain amount in the venture without incurring any further liability can take shares, and, paying for them in full, be free from any further risk, while securing the advantage of the many protections afforded by the Companies Acts, but not conferred by the Limited Partnerships Act.

The common practice is to form a Company Limited by Shares, having a capital sufficient to allow of the assets of the firm being purchased. The Memorandum of Association is then signed by the partners, or if there is only one trader by him and at least one other person¹ The Articles declare that the partners shall be the first directors, and if the company is to be a Private Company they must contain restrictions upon the sale of shares to strangers. If the company is intended to be a "Public" one there must be at least seven subscribers to the Memorandum of Association.

An agreement is next entered into whereby the firm agrees to sell and the company to buy all the assets and the goodwill of the business, the purchase money being payable in shares to be treated as fully or in part paid up, and to be divided among the partners in proportion to their interests in the business sold.²

¹ Even before 1907 it was no objection that one or two persons held substantially all the shares. What are called "one man" companies are lawful (*Salomon v. Salomon & Co.*, [1897] App. Ca. 22).

² This agreement requires the same stamp as if it were a sale to strangers (*John Foster & Sons v. Commissioners of Inland Revenue*, [1894] 1 Q. B. 516).

The usual method is for the company to take over the book and other debts, and to agree to pay the outstanding liabilities of the firm; but it should be remembered that *ad valorem* stamp duty is payable,¹ either upon the agreement or the conveyance, in respect of the whole consideration (excepting only the part apportioned to goods, wares, or merchandise, or cash in hand or at bank on current account), and that the amount of the debts to be paid by the company for the firm is treated as part of the consideration. It is, therefore, a more economical plan to arrange that only the stock-in-trade, freehold and leasehold properties, and other things requisite for carrying on the business shall be sold to the company, that the company shall collect the outstanding debts as agent for the partners, and that the partners shall themselves pay the existing liabilities. If this plan would leave the company with insufficient working capital, it can be set right by the partners agreeing to subscribe for further shares, which they can pay for as the debts are collected.

If the goodwill is treated as a valuable asset, and paid for by the company, *ad valorem* duty will be payable upon the agreement for sale on this amount. It is not, however, necessary to purchase the goodwill; for, as the partners (if they will be the only members of the company) will share in the profits of the company in the same manner as they do in those of the firm, they will not suffer by no price being paid for it, provided that there is a covenant by the partners individually not to trade in competition with the new company; but, on the other hand, this course may result in the capital appearing to be too small for the business carried on—a matter which may affect the credit of the company. For instance, a firm doing business yielding profits of £5000 a year on premises held at a rack rent may well have stock-in-trade only to the amount of £5000 or £10,000, and then, if the book debts are not assigned, and no value is put on the goodwill, the partners would sell the concern to the company for only this £5000 or £10,000, a sum which might give the business the appearance of not being very substantial.

Registration of the contract relating to the issue of fully or partly paid shares pursuant to Section 88 must not be overlooked (see page 197, *supra*).

Partners are often willing to continue to take a certain amount of liability, and in such cases the purchase shares should be treated as only paid up in part. Thus, if the amount to be

¹ See page 113, *supra*.

paid for the business is £10,000, it may be paid by the issue of 20,000 shares of £1 each treated as paid up to the extent of 10s. per share, in which case the members will be under a liability of 10s. per share, or a further £10,000 in all.

Sometimes, while protection is afforded to the sleeping partners, the other partners are willing to continue liable to an unlimited extent. This can be effected by appointing the active partners directors with unlimited liability (see page 323, *supra*), and making the others ordinary members; but, now that limited partnerships are allowed, this course will not frequently be adopted.

It is usual and desirable that all the partners in the old firm should enter into covenants with the company not to trade in competition with it, and not to allow their names to be used in any rival business. It seems that a consideration given for such a covenant does not attract *ad valorem* stamp duty, and that in effect the goodwill of the business may thus be transferred without payment of more than ten shillings duty.

It frequently happens that after a trader's death his executors desire to convert his business into a company. If the testator has not given power for such a conversion, nor authorised the trustees to invest in shares of incorporated companies, they cannot effect a sale to the company, and although there have been cases where the Court has sanctioned such a proceeding, it appears now that the Court has no jurisdiction for such a purpose,¹ unless the arrangement is part of a compromise of disputes with third parties.² The Court has jurisdiction to allow a trustee to go outside the terms of his trust only where the case is one of emergency not foreseen or provided for by the author of the trust and circumstances require that something should be done.³

Even before private companies of only two persons were legalised the number of members holding *substantial* interests in a private company might be small, or indeed consist of a single person; for the House of Lords in 1897 held that if a company was incorporated according to law, and six of the shareholders held only one share each, and the seventh held twenty thousand, the Court could not go behind the Certificate of Incorporation and inquire whether or no such a "one man" company was what the Legislature intended when passing the Companies Acts.⁴ So, in a case where a man held 2499 shares out of the 2500 which constituted the capital of the company, and obtained loans from the company without interest, no dividends being declared, it was

¹ *Re Morrison*, [1901] 1 Ch. 701 : *re Crawshaw*, [1889] 60 L. T. 359.

² *West of England Bank v. Murch*, [1883] 23 Ch. D. 138.

³ *Re New*, [1901] 2 Ch. 534.

⁴ *Salomon v. Salomon & Co.*, [1897] App. Cn. 22.

held that these could not be treated as part of his income for the purpose of super tax.¹ Phillimore, J., however, in 1911, returned to the view that a limited company may be a mere alias of the principal members in a case where fraud is shown.²

A sale, however, by an insolvent trader of substantially all his assets to a company is fraudulent and an act of bankruptcy, and upon the assignor being made bankrupt within three months may be set aside by the trustee in bankruptcy³; but even in such a case, if part of the consideration is issued to persons giving value in good faith and in ignorance of the irregularities practised, this portion of the transaction will stand good.⁴ When the Court sets aside the sale it will treat debenture holders and their trustee, who have taken possession of and carried on the business, as trespassers and liable for the value of any goods of which they have disposed, as well as to hand over the goods remaining in their possession⁵; and where a mortgagee of the bankrupt's property exchanged his mortgage for debentures of the company, it was held that he had lost his mortgage and got no security as debenture holder.⁶

A transfer by a trader to a company in the *bonâ fide* hope of benefitting his creditors does not necessarily tend to defeat or delay creditors, and should not be set aside as void against the trustee⁷; but in a very similar case Horridge, J., held the transfer did tend to defeat and delay creditors, and was an act of bankruptcy.⁸

FOREIGN AND COLONIAL COMPANIES.

Before 1907 the Courts recognised the incorporation of companies abroad to the extent of holding their members free from individual liability for the debts of the company, and allowing them to sue and be sued in British Courts in their corporate name,⁹ the same rules as to service of writs within or out of the jurisdiction applying to them as to private individuals; but there were no special requirements as to the manner in which they might conduct business. As the policy of this country has always been to

¹ Commissioners of Inland Revenue *vs.* Sansom, [1921] 2 K. B. 402.

² *Re* Darley, *ex parte* Brougham, [1911] 1 K. B. 95

³ *Re* Hirth, [1800] 1 Q. B. 612; *re* Whentley, [1901] 85 L. T. 401.

⁴ *Re* Slobodinsky, [1903] 2 K. B. 517.

⁵ *Re* Goldberg, *ex parte* Page, [1912] 1 K. B. 606.

⁶ *Re* Goldberg, *ex parte* Silverstone, [1912] 1 K. B. 384.

⁷ *Re* Harris, *ex parte* Trustee, [1906] 54 W. R. 460, 14 Mans. 127.

⁸ *Re* David and Adlard, *ex parte* Whimney, [1914] 2 K. B. 604.

⁹ *Dutch West India Co. v. Moses*, [1723] 1 Strange 611.

encourage foreigners to trade to the largest extent possible within the kingdom, it would obviously be unwise to impose any restrictions which would hinder foreign corporations from placing their orders for goods or selling their own products in the United Kingdom; but it was felt that such foreign companies as actually set up business here should furnish at least some of the safeguards which our own companies do to their customers, and by Section 274 the following provisions are made:—

Every company incorporated outside the United Kingdom,¹ and every Assurance Company constituted outside the United Kingdom carrying on business within the United Kingdom, whether incorporated or not,² which establishes a place of business in the United Kingdom,³ is required, within one month from the establishment of the place of business, to file with the Registrar—

- (a) A certified⁴ copy (and if not in English a certified⁴ translation) of its Charter, Statutes, or Memorandum and Articles of Association, or other instrument constituting the company or defining its constitution;
- (b) A list of the directors or persons occupying the position of directors of the company;
- (c) The names and addresses of some one or more persons resident in the United Kingdom authorised to accept on behalf of the company service of process or any notices required to be served on the company;

and in case of any alteration in the above matters notice of the alteration must be filed within the time prescribed by the Board of Trade (Section 274, Sub-section 1).

Any process or notice will be sufficiently served if addressed to the person named as above and left at or sent by post to the address filed (Sub-section 2).

Every such company must in every year file a statement of affairs similar to the balance sheet or statement which a British company is required to include in its Annual Summary⁵ (Sub-section 3, see page 446, *supra*).

¹ This will include companies registered in the British Colonies and India, or in the Channel Islands or the Isle of Man.

² Assurance Companies Act, 1900, Section 19.

³ Carrying on business through agents is not establishing a place of business (Lord Advocate v. Huron and Erie Loan Co., [1911] S. C. 612 Court of Sess.).

⁴ I.e. certified in such manner as may be prescribed by the Board of Trade (Sub-section 6). The manner prescribed is set out in the Regulations of the Board of Trade dated the 26th March, 1919.

⁵ There is no requirement that if the balance sheet is in a foreign language any translation should be filed.

The words "place of business" include a share transfer or share registration office (Sub-section 6).

Every foreign company having a place of business in the United Kingdom which uses the word "Limited" as part of its name must—

- (a) In every prospectus inviting subscriptions for its shares or debentures in the United Kingdom state the country in which the company is incorporated;
- (b) Conspicuously exhibit on every place where it carries on business in the United Kingdom the name of the company and the country in which it is incorporated; and
- (c) Have the name of the company and its country mentioned in legible letters in all billheads and letter paper, notices, advertisements, and other official publications of the company (Sub-section 4).

The penalty for default is a fine not exceeding fifty pounds, and in case of a continuing offence five pounds a day, payable by the company and every officer or agent of the company¹ (Sub-section 5).

There is a fee payable to the Registrar for filing any document, the amount being five shillings, or such less sum as may be prescribed by the Board of Trade (Sub-section 7).

These provisions will enable a customer of a foreign company to know something about the corporation with which he is dealing, and will render the service of writs and other processes more easy; but it only affects companies having a place of business in the United Kingdom, and not such as do business only through agents² or by correspondence from abroad.

Colonial companies are subject to the law of the Colony in which they are incorporated. In Canada a company may be incorporated either under the Dominion Statutes or under those of the Province, and the Provincial Legislatures cannot by Statute sterilize or destroy the capacities or powers which the Dominion has validly conferred.³

¹ There are no such words as "knowingly a party to such default."

² See *Grant v. Anderson & Co.*, [1892] 1 Q. B. 108; *Lord Advocate v. Huron and Erie Loan Co.*, [1911] S. C. 612, Court of Sess.

³ *Great West Saddlery Company v. The King*, [1921] App. Ca. 91.

BOOK III.

WINDING UP OF COMPANIES. .

CHAPTER I.

WINDING UP BY THE COURT.

IN the absence of statutory enactments the creditors of a corporation enforce their claims by levying execution upon or obtaining a receiver over the corporate property, and by suing the members for the amounts they are liable to contribute; but since the year 1844 the winding up of trading companies has been the subject of express legislation, whereby, instead of each creditor proceeding separately to enforce his rights against an insolvent company and its members, an officer called "the Liquidator" is appointed to collect the property and assets, and enforce payment of the contributions due from the members, for the purpose of distributing the sums realised among the persons entitled thereto, whether as creditors or members.

Under the provisions of the Act a creditor cannot sue the members individually, or after a winding-up order attach the property of the company, the liquidator acting as a trustee for those purposes.¹ In a voluntary liquidation the right of a creditor to seize the company's property is not automatically stayed, but an order may be obtained having that effect, and in practice the result is the same in the case of a voluntary or a compulsory winding up.

The sections regulating the winding up of companies are contained in Part IV. of the Act (which by Part VIII. is extended, with certain modifications, to unregistered companies, partnerships, and associations consisting of more than seven members). A new body of Rules governing the practice and procedure in winding up, dated the 29th March, came into force on the 1st April, 1909.²

¹ If an unregistered company is wound up under Part VIII. of the Act no contributory can be sued by the creditors without the leave of the Court (see Section 271).

² By an Order of 26th July, 1921, coming into operation on 1st September, 1921, certain of the Rules as to meetings &c. in a compulsory liquidation were extended so as to apply in a voluntary liquidation, and a new Rule (149A) was added. These are dealt with in their proper place.

The Statutes recognise three forms of Liquidation: namely—(1) Winding Up by the Court, often called “Compulsory Liquidation”; (2) Voluntary Liquidation; and (3) Voluntary Liquidation subject to the Supervision of the Court (Section 122).

In order to prevent any winding up of a company outside the Act, it is provided by Section 210, Sub-section (3), that any conveyance or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void to all intents. A debenture by way of floating charge issued to a trustee for the benefit of all the company's creditors is a “conveyance or assignment” within this section if the value of the equity of redemption is merely nominal.¹

A compulsory liquidation is initiated by an Order of the Court, made on the petition of one or more creditors or contributories or of the company. A voluntary winding up is initiated by a special or extraordinary resolution of the company, or in rare cases by an ordinary resolution (see page 524), and is therefore the act of the company alone; but it may be continued under the supervision of the Court upon an Order being made to that effect by the Court on petition duly presented.

“The Courts having jurisdiction to wind up companies² registered in England shall be the High Court, the Chancery Courts of the Counties Palatine of Lancaster and Durham, and the County Courts” (Section 131). The Stannaries Court, which had jurisdiction over mining companies in the Stannaries, has been abolished, and its powers vested in the County Courts of Cornwall.³

Where the paid-up capital of the company exceeds £10,000 the winding up must be commenced in the High Court, or, if the company is situate within the jurisdiction of a Palatine Court, either in the High Court or in such Palatine Court. The winding up of companies with a paid-up capital not exceeding £10,000 must be commenced in the County Court. But the Lord Chancellor may exclude a County Court from having jurisdiction, and by order the County Courts not having jurisdiction in Bankruptcy

¹ London Joint City and Midland Bank v. Herbert Dickinson, [1922] W. N. 13.

² That is, companies brought under the provisions of the Acts. If a company is not duly incorporated, or is an illegal association, or not being a private company, consists of less than seven members, the Court has no jurisdiction to wind it up (National Debenture and Assets Corporation, [1891] 2 Ch. 505). Companies having no capital are subject to the jurisdiction (*re* North of England Iron Steamship Insurance Association, [1900] 1 Ch. 481).

³ Section 131, Sub-section 4; Stannaries Court Abolition Act, 1896, Section 1. As to its jurisdiction see *Dunbar v. Harvey*, [1913] 2 Ch. 530, from which it appears that this Court has power to wind up partnerships formed to work metalliferous mines in the Stannaries whatever the number of the partners.

are excluded. This excludes the Metropolitan County Courts, whose jurisdiction passes to the High Court of Justice.¹ Further, the winding up of companies formed to work metalliferous mines within the Stannaries only must be commenced in a County Court of Cornwall, whatever the capital of the company, and if commenced elsewhere will be transferred to that Court² (see Section 131, Sub-sections 2 to 5).

The County Court cannot, however, decide questions between the company and a stranger arising out of transactions occurring before the liquidation³; and where a company, whether registered or not, has no share capital, the County Court has no jurisdiction to wind it up, since Section 131, Sub-section (3), only applies to companies having a share capital.⁴ The petition in such a case must be presented to the High Court.

It is provided by Section 131, Sub-section 7, that nothing in that section shall invalidate a proceeding by reason of it being taken in a wrong Court. The same rule applies in Bankruptcy, under which it has been held that, although any order made is valid, the wilful presentation of a petition in the wrong Court is a ground for dismissing it⁵; but the Court may make a winding-up order and direct the subsequent transfer to the proper Court.⁶

For the purposes of winding up the County Courts have all the powers of the High Court (Section 131, Sub-section 6), including the power to commit to prison for disobedience of their orders,⁷ but they must act through their own officers⁸ (see Rules 22 and 24). From County Court orders an appeal lies to the Divisional Court, and procedure by certiorari or writ of prohibition is not the proper remedy.⁹

¹ Court Bureau No. 2, [1891] W. N. 15.

² New Terras Tin Mining Co., [1894] 2 Ch. 344.

³ Ilkley Hotel Co., [1893] 1 Q. B. 248.

⁴ North of England Iron Steamship Insurance Association (*supra*); Monmouthshire and South Wales Employers Mutual Indemnity Society, *in re*, [1900] W. N. 6; Twentieth Century Equitable Friendly Society, *in re*, [1910] W. N. 230; Victoria Society (Knottingley), *in re*, [1913] 1 Ch. 167; Ironfounders (Bradford Branch) Social Club and Institute, *in re*, [1923] W. N. 127.

⁵ *Ex parte May, re Brightmore*, [1885] 14 Q. B. D. 37; *ex parte French, re French*, [1890] 24 Q. B. D. 63.

⁶ Section 133, Sub-section 1; Milford Haven Shipping Co., [1895] W. N. 16, Buller Tin Co., [1887] 35 Sol. J. 200.

⁷ New Par Consols No. 2, [1898] 1 Q. B. 669.

⁸ For example, a direction cannot be given to levy under a *fi. fa.* (*Bassett's Plaster Co.*, [1894] 2 Q. B. 90).

⁹ New Par Consols No. 2, [1898] 1 Q. B. 669; *Skinner v. Northallerton County Court Judge*, [1899] A. C. 430.

A special case may be stated for determination by the High Court if all the parties or one of the parties and the County Court Judge so desire (Section 133, Sub-section 3).

Cases may be transferred from one Court to another, and this transfer¹ may be made, if good cause is shown, even before the winding-up order.² But there is no power to transfer the winding up of a company commenced in the High Court to a County Court which has not jurisdiction to wind up: *e.g.* to the City of London or other Metropolitan Court.³

In Ireland the Court having jurisdiction to wind up companies is the High Court, which has power to direct that all proceedings subsequent to the winding-up order shall be in the Court of Bankruptcy having jurisdiction in the place where the company's registered office is situate (Section 134).

In Scotland the jurisdiction is vested in the Court of Session in either division, or in the event of a remit the Lord Ordinary during session, and in time of vacation the Lord Ordinary on the bills (Section 135), with power to direct all proceedings after the winding-up order to be taken before one of the permanent Lords Ordinary (Section 136).

Besides companies incorporated under the Acts, the Court has jurisdiction, under provisions contained in the Acts relating to such societies, to wind up those registered under the earlier Companies Acts (Part VI. of the Act), Trustee Savings Banks,⁴ Building Societies,⁵ and Industrial and Provident Societies.⁶ There is no similar provision in the Friendly Societies Act, but it has been held that such a society may be wound up under the Companies Acts, even though it has passed a resolution to dissolve,⁷ and so also may a friendly society not registered under the Friendly Societies or any other Acts.⁸

By Part VIII. of the Act (Sections 267 and 268) any partnership, association, or company consisting of more than seven

¹ See note 6 on previous page.

² *Re W. Laxon & Co.* No. 1, [1892] 3 Ch. 31. The application should be by originating summons.

³ *Re Real Estates Co.*, [1892] W. N. 184.

⁴ Trustee Saving Banks Act, 1887 (Section 3).

⁵ Building Societies Act, 1894 (Section 8). From an English case it seemed that building societies formed before 1874 which have not obtained a certificate of incorporation under the Act of 1874 now come within Section 1 of The Companies (Consolidation) Act, 1908, and there is no jurisdiction to wind them up (*Ilfracombe Permanent Mutual Benefit Building Society*, [1901] 1 Ch. 102); but in Scotland it has been held otherwise (*Smith's Trustees v. Irvine and Fullarton Building Society*, [1904] Court of Sess., 6 F. 99).

⁶ Industrial and Provident Societies Act, 1893 (Section 58).

⁷ *Irish Mercantile Loan Society*, [1907] 1 Ir. R. 98; *20th Century Equitable Society*, [1910] W. N. 236.

⁸ *Victoria Society, Knottingley*, [1913] 1 Ch. 167.

members,¹ except a railway company incorporated by Act of Parliament,² and any limited partnership registered in Scotland or Ireland,³ may be wound up by the Court under the Consolidation Act whenever it has dissolved or ceased to carry on business, or is unable to pay its debts, or the Court is of opinion that it is just and equitable that the company should be wound up. This includes companies (other than railway companies) incorporated by special Act⁴ or by Provisional Order of the Board of Trade⁵ or by Royal Charter,⁶ and also tramway companies under the Irish Tramways Acts,⁷ and where a railway company incorporated before 1869 has abandoned its whole railway it may be wound up under the Consolidation Act.⁸ In the case of a tramway, canal, or other company of public utility it is no bar to the making of the winding-up order that the undertaking is of public advantage or that it cannot be sold without application to Parliament,⁹ but in such a case the Court is reluctant to make the order if by any other means justice can be done.¹⁰

Foreign or colonial corporations carrying on business in England are subject to the jurisdiction of the English Courts,¹¹

¹ The seven is exclusive of past members or the representatives of deceased or bankrupt members (Bowling and Welby's Contract, [1895] 1 Ch. 663); but the word "members" does not necessarily mean "shareholders" (South London Fish Market Co., [1888] 39 Ch. D. 324). The jurisdiction of the County Court in Cornwall to wind up companies formed to work metalliferous mines extends to partnerships, whatever the number of partners (Dunbar v Harvey, [1913] 2 Ch. 531).

² That is to say, companies whose principal object is to construct or work railways. The exception does not include companies with powers to construct a small railway as subsidiary to their general objects (Exmouth Docks Co., [1874] 17 Eq. 171, or Tramway Companies (Borough of Portsmouth &c. Tramways Co., [1892] 2 Ch. 362), and in certain cases Railway Companies may be wound up under this Act in pursuance of The Abandonment of Railways Acts, 1850 and 1869 (see Section 267).

³ Until 1913 limited partnerships in England were wound up under the Companies Acts. By The Bankruptcy Act, 1913, the winding up was transferred to the Bankruptcy Court. A limited partnership was wound up compulsorily where it was being carried on at a loss and no partner was under any obligation to bring in further capital and the general partner neglected his duties (*re Hughes & Co.*, [1911] 1 Ch. 342).

⁴ Bradford Navigation Co., [1870] 10 Eq. 331; Wey and Arun Junction Canal, [1897] 4 Eq. 197; Brentford and Isleworth Tramways Co., [1894] 26 Ch. D. 527; Borough of Portsmouth &c. Tramways Co., [1892] 2 Ch. 362.

⁵ Barton-on-Humber Water Co., [1889] 42 Ch. D. 585.

⁶ *Re Oriental Bank*, [1885] 54 L. J. Ch. 481, but not Royal Societies (see page 460, *infra*).

⁷ *Re O'Neil*, [1890] Ir. R. 263.

⁸ Abandonment of Railways Act, 1869.

⁹ *Marshall v. South Staffordshire Tramways Co.*, [1895] 2 Ch. 36; *Barton-on-Humber Water Co.*, [1889] 42 Ch. D. 585; *Isle of Wight Ferry Co.*, [1864] 2 H. & M. 597; *Proprietors of the Basingstoke Canal*, [1896] 14 W. R. 956; *Wey and Arun Junction Canal*, [1897] 4 Eq. 197.

¹⁰ *Exmouth Docks Co.*, [1874] 17 Eq. 181; *South London Fish Market Co.*, [1888] 39 Ch. D. 324; *Free Fishermen of Faversham*, [1887] 36 Ch. D. 320.

¹¹ *Madrid and Valencia Railway Co.*, [1850] 3 De G. & Sm. 127, 2 Mac. & G. 169; *Commercial Bank of South Australia*, [1886] 33 Ch. D. 174; *Mutheson Brothers & Co.*, [1884] 27 Ch. D. 170; *Mercantile Bank of Australia*, [1892] 2 Ch. 294; *Imperial Anglo-German Bank*, [1872] 26 L. T. 229; *Jarvis Conklin Mortgage Co.*, [1894] 11 Times L. R. 373; *Syria Ottoman Railway Co.*, [1904] 20 Times L. R. 217.

even if already being wound up under the order of a foreign Court,¹ but not a foreign corporation having agencies but no office or branch in this country,² nor a Scotch company.³ The order in the case of foreign corporations already in liquidation abroad usually restricts the liquidator's powers to dealing with the English assets (see cases cited on page 467 in note 11).

An assurance company carrying on business within the United Kingdom, although consisting of seven or less members, may be wound up under the Act, whether established within or without the United Kingdom.⁴

Partnerships and syndicates⁵ (including cost book mining companies⁶) may be also wound up by the Court under the Companies Act if consisting of eight or more members; but if the number of members is less, except in cases under the Stannaries Act (see note⁶), there is no such jurisdiction to wind up an ordinary partnership, and an action must be brought.⁷ The Limited Partnerships Act, 1907 (Section 6, Sub-section 4), directs that "applications to the Court to wind up a limited partnership shall be by petition under The Companies Acts, 1862 to 1900, and the provisions of those Acts relating to the winding up of companies by the Court and of the Rules made thereunder . . . shall apply to the winding up by the Court of limited partnerships." But The Bankruptcy Act, 1913, Section 24, applied the Bankruptcy Acts to limited partnerships in England as from the 1st April, 1914, and repealed such of the provisions of The Companies (Consolidation) Act, 1908, as relate to the winding up of limited partnerships in England. The Bankruptcy Act of 1913 is, however, repealed by The Bankruptcy

¹ North Australian Territory Co. v. Goldsbrough, [1889] 61 L. T. 716.

² Lloyd Generale Italiano, [1885] 29 Ch. D. 219. In this case the ground given in the judgment was want of residence within the jurisdiction. It appeared, however, also that there were no assets in this country.

³ Scottish Joint Stock Trust, [1900] W. N. 114.

⁴ Assurance Companies Act, 1909, Sections 1 and 15 (see page 460, *infra*). Apart from some such statutory provision an unregistered partnership, association, or company which does not consist of more than seven members cannot be wound up under the Act (see Section 267).

⁵ Whether persons engaged in a common adventure constitute a partnership is a question of fact. For instances see Royal Victoria Palace Theatre Syndicate, [1873] 29 L. T. 668, [1874] 30 L. T. 3; South of France Pottery Syndicate, [1877] 36 L. T. 651; Adamsoma Films Co., [1874] 9 Ch. 635, 637 note.

⁶ Frank Mills Mining Co., [1883] 23 Ch. D. 52. For the purpose of winding up, a partnership of two persons in Cornwall to work metalliferous mines is a company, and the County Court of Cornwall has exclusive jurisdiction to wind it up (*Dunbar v. Harvey*, [1913] 2 Ch. 530).

⁷ Bolton Benefit Loan Society, [1875] 12 Ch. D. 679. South London Fish Market Co., [1888] 39 Ch. D. 324. Bowling and Welby's Contract, [1805] 1 Ch. 663.

Act, 1914, and the provisions of the latter Act are now applicable to the winding up of such partnerships (Section 127).

Illegal associations cannot be wound up under the Act. Thus, an unregistered mutual insurance association consisting of more than twenty members formed since 1862 is illegal and cannot be wound up,¹ but if formed before that date such an association is capable of being wound up under the Act²; and before 1901, if less than seven members signed the Memorandum a company was not properly registered and could not be wound up under the Acts.³ Section 268, Sub-section 1, refers to the "principal place of business" of any unregistered association which is to be wound up, and under similar words in the Act of 1862 that Act was held not to apply to associations not carrying on any business: e.g. a literary association⁴; an association for purchasing and dividing land into allotments for the members,⁵ and under the earlier Act the word "association" was held not to apply to a club.⁶ An unregistered benefit society may be wound up by the Chancery Division under its general jurisdiction to administer trusts without reference to the Companies Act,⁷ and there may be other cases where the Court has this power and would exercise it.⁸

Municipal and ecclesiastical corporations are not, however, within the Act, nor are societies incorporated by Royal Charter, such as the Royal Society for the Advancement of Science,⁹ and illegal associations cannot be wound up by the Court.¹⁰

Companies which have been duly dissolved cannot (unless the dissolution be set aside under Section 223) be reached by

¹ Padstow Total Loss &c. Assurance Association, [1882] 20 Ch. D. 137.

² Lee and Moot's Case, [1868] 5 Eq. 308; London Marine Insurance Association, [1869] 8 Eq. 176, 185.

³ National Debenture and Assets Corporation, [1891] 2 Ch. 505. Section 1 of the Act of 1900, however, made the Certificate of Incorporation conclusive evidence that the company was duly registered, and the same provision is re-enacted in Section 17 of the Consolidation Act.

⁴ Bristol Athenæum, [1890] 43 Ch. D. 236, Russell Institution, [1898] 2 Ch. 72.

⁵ Osmundthorpe Hall Allotment Society, [1913] W. N. 243.

⁶ St. James's Club Case, [1852] 2 De G. M. & G. 383. Followed by Buckley, J., in the case of a working men's club registered as a friendly society.

⁷ Re Leud Workman's Fund Society, [1904] 2 Ch. 196, the case of a benefit society formed in 1817 which could no longer carry out its objects.

⁸ See Ward v. Sittingbourne Railway Co., [1874] L. R. 9 Ch. 488, and cases cited on page 492 of that report.

⁹ "Lindley on Companies," Sixth Edition, page 837; Free Fishermen of Faversham, [1887] 36 Ch. D. 329 at page 347.

¹⁰ South Wales Atlantic Steam Co., [1876] 2 Ch. D. 763; Padstow Total Loss &c. Assurance Association, [1882] 20 Ch. D. 137, National Debenture and Assets Corporation, [1891] 2 Ch. 505.

a winding-up order, and companies struck off the Register under Section 242 must be restored to the Register before they can be wound up.¹

It is to be noted, however, that Part VIII. of the Act of 1908 does not authorise unregistered companies and associations to be wound up under the Companies Acts voluntarily or under the supervision of the Court, and registration after petition presented will not avail² (Consolidation Act, Section 268, Sub-section 1, ii.).

If an order to wind up is made without jurisdiction it is not a judgment *in rem* so as to bind strangers: *e.g.* purchasers of the property of the company.³

WHEN A COMPANY MAY BE WOUND UP COMPULSORILY.

By Section 129 of the Consolidation Act the Court may wind up a company—

- (i.) If the company has by special resolution resolved that the company be wound up by the Court:
- (ii.) If default is made in filing the statutory report or in holding the statutory meeting.⁴
- (iii.) If the company does not commence its business within 'a year from its incorporation, or suspends its business for a whole year:
- (iv.) If the number of members is reduced, in the case of a private company, below two,⁵ or, in the case of any other company, below seven:
- (v.) If the company is unable to pay its debts:
- (vi.) If the Court is of opinion that it is just and equitable that the company should be wound up.

On the first of the above grounds it will be seen that the company is itself the judge. Under the second the Court may, instead of making an order, give directions for the report to be filed or a meeting to be held, or make such order as may be just

¹ Puerto Silver Mining Co., [1878] 8 Ch. D. 273; London and Caledonian Marine Insurance Co., [1879] 11 Ch. D. 140.

² Hercules Insurance Co., [1871] 11 Eq. 321.

³ Bowling and Welby's Contract, [1895] 1 Ch. 663.

⁴ An order was made on this ground, the petition being unopposed, in *re* Kent Outcrop Coal Co., [1912] W. N. 26.

⁵ If a private company makes default in complying with the special provisions constituting it a private company it loses the benefit of this limitation, and may be wound up if the number of its members is reduced below seven (The Companies Act, 1913, Section 1)

(Section 65, Sub-section 9). The third is a question of fact; but the jurisdiction under this head is discretionary, and if the delay in commencing or the interruption of the business is explained, and there is a probability of business being commenced or resumed, the Court will refuse the order,¹ at any rate if a large proportion of the members so desire²; but if the majority against the winding up are unreasonable the order will be made.³

If less than a year has elapsed the Court may order a winding up under the "just and equitable" paragraph, but will not do so unless a very strong case is made out.⁴ To abandon a part of the business of the company does not bring it within this provision unless the part is substantially the whole,⁵ but even in the latter case the petitioner usually seeks to bring his case within the principle that it is just and equitable to wind up a company when its substratum is gone. This is discussed below.

In addition to the power given by this Section, there is power under Section 242 to strike off the Register companies which do not reply to an inquiry from the Registrar whether they are carrying on business. Three months after the publication of a notice in the *Gazette* the name is struck off and the company is dissolved (see page 618, *infra*), but in such case there is no winding up.

It is said that no order has been made to wind up a company on the ground that the members are reduced to less than the prescribed minimum. If a company carries on business for a period of six months after such reduction has taken place the members cognisant of the fact become severally liable for the debts contracted during such time, and may be sued without joinder of any other member (Section 115). It would seem also that, in estimating the number of members, past members (although still contingently liable) and the representatives of deceased members must not be counted.⁶

¹ Metropolitan Railway Warehousing Co., [1867] 36 L. J. Ch. 827.

² Petersburg Gas Co., [1874] W. N. 106 (nine tenths in favour of continuing the company); Middlesbrough Assembly Rooms Co., [1880] 14 Ch. D. 101 (four fifths); re Capital Fire Insurance Association, [1882] 21 Ch. D. 200 (business had been commenced abroad); Tomlin Patent Horseshoe Co., [1886] 55 L. T. 314.

³ Tunacacori Mining and Land Co., [1874] 17 Eq. 531.

⁴ Langham Skating Rink Co., [1877] 5 Ch. D. 685; London and County Coal Co., [1867] 3 Eq. 355; Hop and Malt Exchange Co., [1866] W. N. 222.

⁵ Norwegian Titanic Iron Co., [1866] 35 Beav. 223; New Gas Co., [1877] 5 Ch. D. 703; Patent Bread Machinery Co., [1866] 14 W. R. 787, 14 L. T. 582; Kronand Metal Co., [1866] W. N. 15.

⁶ Bowling and Welby's Contract, [1865] 1 Ch. 663.

The test whether a company is able to pay its debts is defined by Section 130 as follows:—

A company shall be deemed to be unable to pay its debts—

- (i.) If a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding fifty pounds then due, has served on the company, by leaving the same at its registered office, a demand under his hand requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or
- (ii.) If, in England or Ireland, execution or other process issued on a judgment decree or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
- (iii.) If, in Scotland, the inducie of a charge for payment on an extract decree, or an extract registered bond, or an extract registered protest have expired without payment being made; or
- (iv.) If it is proved to the satisfaction of the Court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the Court shall take into account the contingent and prospective liabilities of the company.

Paragraphs i., ii., and iii. are convenient methods of enabling a creditor to prove that the company is “unable to pay its debts” within the meaning of Paragraph v. of Section 129. He may, however, prove this fact in other ways, as mentioned below.*

Where a judgment has passed against a Company the Court will not stay proceedings on a winding up petition, or refuse an order because an appeal is pending, but will usually allow the petition to be suspended if security is given by the company for the amount of the debt and costs.¹

If the demand under Paragraph i. be in respect of a debt the amount whereof, although admitted to exceed fifty pounds, is disputed, the Court may refuse to make the order, and still more if the debt is wholly disputed.² But if an order has been made it will not be invalid because it subsequently appears that the debt, although exceeding fifty pounds, was less than the amount demanded,³ and, as the words in the section are “neglected to pay,” an *omission* to pay may be explained (as in the case of a disputed debt or non-receipt of the demand) so as not to form a ground for winding up.⁴ Under Paragraph i. no less debt than fifty pounds will avail, nor will there be any ground for presenting

¹ Amalgamated Properties of Rhodesia, [1917] 2 Ch. 115.

² London Wharfing Co., [1866] 35 Beav. 37; Brighton Club Co., [1866] 35 Beav. 204; London and Paris Banking Corporation, [1875] 19 Eq. 444, *re* Gold Hill Mines, [1883] 29 Ch. D. 211.

³ Cardiff Coal Co. *v.* Norton, [1807] 2 Ch. 405.

⁴ London and Paris Banking Corporation, [1875] 19 Eq. 444.

a petition until the twenty-one days named have elapsed¹; but the petitioner can proceed under the other paragraphs, and if he shows that the company is unable to pay its debts—*e.g.* if it dishonours its acceptances,² or the creditor is informed by a responsible officer of the company that there are no assets³—the order may be made. The assignee of a part of a debt due from the company cannot make the demand under Paragraph i. in the absence of the person entitled to the remainder of the debt; but he may petition for an order if he can prove insolvency under Paragraphs ii., iii., or iv.⁴ Where the petitioner's debt is less than fifty pounds the practice is now to refuse the order,⁵ unless special circumstances exist, such as that the company is acting unfairly by refusing to make calls to pay its debts,⁶ but an order may be made without costs if the Court thinks fit.⁷

If a company has no registered office the demand may be served at the actual office of the company.⁸

The provision that the Court shall take into account the contingent and prospective liabilities of the company was introduced in 1907. Previously it was the law in the case of life assurance companies only; in other companies only present debts were considered.⁹

In considering whether a company is solvent, its unpaid capital is an asset which should be considered, unless this has been declared to be reserve capital under the Act of 1879 or Sections 58 and 59 of the Consolidation Act.¹⁰ On the other hand, its paid-up capital is not a debt, and a company may be perfectly solvent although it has lost the whole or a part of its paid-up capital.

The power of the Court to wind up a company under Section 129, Paragraph vi., whenever it considers that it is just and equitable to do so, has been decided not to be a power to be exercised upon any grounds that may *seem* just or equitable, but only upon grounds of the same class as those specified in that section,¹¹

¹ Catholic Publishing Co., [1864] 2 De G. J. & S. 116, 33 L. J. Ch. 325.

² Globe New Patent Iron and Steel Co., [1875] 20 Eq. 337.

³ Flagstaff Silver Mining Co. of Utah, [1875] 20 Eq. 208, Yate Collieries Co., [1883] W. N. 171.

⁴ Steel Wing Co., [1921] 1 Ch. 349.

⁵ Industrial Assurance Association, [1910] W. N. 245.

⁶ World Industrial Bank, [1909] W. N. 118.

⁷ *Re* Herbert Standring & Co., [1895] W. N. 99. Costs are usually allowed if other creditors for an amount exceeding fifty pounds support (*Leyton and Walthamstow Cycle Co.*, [1902] 50 W. R. 93).

⁸ British and Foreign Gas Generating Apparatus Co., [1865] 13 W. R. 640, 12 L. T. 368.

⁹ European Life Assurance Society, [1870] 9 Eq. 122; *ex parte* Spackman, [1840] 1 Mac. & G. 170, 18 L. J. Ch. 261.

¹⁰ Bristol Joint Stock Bank, [1800] 44 Ch. D. 703; European Life Assurance Society, [1870] 9 Eq. 122; Suburban Hotel Co., [1867] 2 Ch. 737.

¹¹ *Ex parte* Spackman, [1840] 1 Mac. & G. 170; Suburban Hotel Co., [1867] 2 Ch. 737; Anglo-Greek Steam Navigation Co., [1866] 2 Eq. 1.

but see page 475. *infra*. This power extends to cases where the substratum of the company is gone (and a complete deadlock in the management of the company's affairs is now also considered a ground for winding up¹), and the Court will wind up a company even within a year of its formation, although it may be solvent, if it appear that it has become impossible to carry on the business for which it was formed²—*e.g.* where the mine which the company was formed to work could not be found,³ or the patent it was to work was not granted,⁴ or the bulk of its property had been sold and its capital exhausted,⁵ or there is no reasonable probability of obtaining the benefit of the contract it was formed to carry out,⁶ or if the substratum on which it was founded is gone (as, for instance, where a bank had ceased to carry on banking business⁷), or the mine which the company was working proved worthless,⁸ or a company formed to amalgamate three syndicates for speculating in seats for the Diamond Jubilee proposed, after losing money over that speculation, to do other financial business,⁹ or a single steamship company had lost its only ship and proposed with a small sum of cash to carry on business as a charterer of ships.¹⁰ A company may also under these words be wound up on the ground that the company was in its inception fraudulent and hopelessly embarrassed by actions for rescission and that a winding up is the best means of recovering money from the promoters,¹¹ or that the company never had a real foundation and was a mere "bubble,"¹² or is formed to carry on an illegal business, such as the dealing in lottery bonds.¹³

An extension of the "just and equitable" principle is to be found in the case of private companies consisting of so few members as to be practically partnerships. If disputes of such a character

¹ *Sailing Ship Kentmere Co.*, [1897] W. N. 58.

² This principle was first suggested in the case of the *Suburban Hotel Co.*, [1867] 2 Ch. D. 737. But if the petition is presented on this ground a strong case is required (*Scobie v. Atlas Steel Works*, [1907] Court of Sess., 8 F. 1052).

³ *Haven Gold Mining Co.*, [1882] 20 Ch. D. 151.

⁴ *German Date Coffee Co.*, [1882] 20 Ch. D. 169.

⁵ *Diamond Fuel Co.*, [1879] 13 Ch. D. 400.

⁶ *Bleriot Manufacturing Aircraft Co.*, [1916] 32 T. L. R. 253.

⁷ *The Crown Bank*, [1890] 44 Ch. D. 634.

⁸ *Red Rock Mining Co.*, [1880] 61 L. T. 785.

⁹ *Amalgamated Syndicates*, [1897] 2 Ch. 600.

¹⁰ *Pirie v. Stewart*, [1905] Court of Sess., 6 F. 847.

¹¹ *Re Thomas Edward Brinshead & Sons*, [1897] 1 Ch. D. 406; compare *Diamond Fuel Co.*, [1879] 13 Ch. D. 400, and *General Phosphate Corporation*, [1893] W. N. 142.

¹² *Anglo-Greek Steam Navigation Co.*, [1866] 2 Eq. 1; *West Surrey Tanning Co.*, [1866] 2 Eq. 737; *London and County Coal Co.*, [1867] 3 Eq. 355.

¹³ *International Securities Corporation*, [1908] 99 L. T. 581, where *Swinfen Eady, J.*, also held that the company was conducted in a fraudulent manner.

exist between the members that the business can no longer be carried on in a reasonable manner the Court will make a compulsory order to wind up the company at the instance of one of the members.¹ In this case Cozens Hardy, M. R., said: "It has been urged upon us that although it is admitted that the 'just and equitable' clause is not to be limited to cases *ejusdem generis*, it has nevertheless been held, according to the authorities, not to apply except where the substratum of the company has gone or where there is a complete deadlock. Those are two instances which are given, but I should be very sorry, so far as my individual opinion goes, to hold that they are strictly the limits of the 'just and equitable' clause as found in the Companies Act. I think that in a case like this we are bound to say that circumstances which would justify the winding up of a partnership between these two by action are circumstances which would induce the Court to exercise its jurisdiction under the 'just and equitable' clause and to wind up the company." Warrington, L. J., said of the *ejusdem generis* rule²: "That opinion has long been abandoned." These views have been confirmed by the Judicial Committee of the Privy Council in a judgment in the course of which the authorities were carefully reviewed.³ It must now be taken as established that the "just and equitable" clause confers upon the Court a separate ground of jurisdiction to make a winding-up order. On looking at the six statutory grounds (set out on page 470, *supra*) it will be noticed that the first five are each definite conditions, and quite different in character to the sixth ground, which rests upon the opinion of the Court. There is therefore no reason why the Court should be fettered in forming its opinion on the sixth ground by the necessity of finding the existence of facts analogous to those which constitute the first five grounds. In Ireland, however, the Court of Appeal has also stated that the *ejusdem generis* rule does not apply, and wound up a company on just and equitable grounds where a majority of the shareholders supported a managing director in refusing to account for moneys improperly retained by him after an Order of Court had been made that he should so account.⁴ A company was wound up where there were only three shareholders, each holding one third of the capital, and an Article directed that if one shareholder offered his shares to the others and they refused to purchase the company should be wound up. In this case the winding

¹ *Yemdje Tobacco Company*, [1916] 2 Ch. 426.

² [1916] 2 Ch. at page 435.

³ *Loch v. John Blackwood, Limited*, [1924] A. C. 783.

⁴ *Newbridge Sanitary Steam Laundry Co.*, [1917] 1 I. R. 67.

up was on the ground that it was just and equitable, and that though the Article was not binding on the Court it formed a reason for holding that the company ought to be wound up.¹

The Court will not, however, wind up a company because it is not prosperous,² or its chance of success small,³ unless the company pass a special resolution for liquidation. In considering whether the substratum is gone the Court will look at what the company puts in the forefront of its Memorandum of Association as its special object, and if that object has failed the Court will treat the substratum as gone, and order a winding up, although the general powers of the Memorandum authorise other business, such as working mines other than those originally forming the company's business⁴; but the terms of the later clauses may be such as to show that the primary clauses are really not intended to be exclusive of other wide powers.⁵

The Court will not, however, make a winding-up order to redress wrongs other than those of the class indicated in the sections above quoted: *e.g.* frauds by promoters where the company still has a business to carry on,⁶ or frauds on the public not connected with the formation of the company,⁷ or mismanagement or misapplication of funds by directors,⁸ or the commission of *ultra vires* acts⁹; nor can a shareholder obtain a winding up on the ground that he was induced to take his shares by fraud.¹⁰

GROUND OF OBJECTION TO A COMPULSORY ORDER.

Prima facie if a creditor has brought himself within the provisions of Section 129 he is entitled against a company not already in voluntary liquidation to have a compulsory order made as of right.¹¹ But to this rule there are certain exceptions.

¹ American Pioneer Leather Co., Limited, [1918] 1 Ch. 536.

² Langham Skating Rink Co., [1877] 5 Ch. D. 669, Suburban Hotel Co., [1867] 2 Ch. D. 737.

³ Kromund Metal Co., [1899] W. N. 15.

⁴ Red Rock Mining Co., [1889] 61 L. T. 785, Coolgardie Consolidated Gold Mines, [1897] 76 L. T. 269, Stephens v. Mysore Reefs (Kangundry) Mining Co., [1902] 1 Ch. 745. But the Memorandum must be closely scanned. With words only slightly differing from those in the cases cited, Warrington, J., held that other mines were within the original contemplation of the company (Pedlar v. Road Block Gold Mines, [1905] 2 Ch. 427); and see Campbell v. Australian Mutual Provident Society, [1909] 77 L. J. P. C. 117, 99 L. T. 3.

⁵ Butler v. Northern Territories Mines of Australia, [1907] 96 L. T. 41, see also Cotman v. Brougham, [1918] App. Ca. 511.

⁶ Haven Gold Mining Co., [1882] 20 Ch. D. 151.

⁷ Medical Battery Co., [1894] 1 Ch. 444.

⁸ Anglo-Greek Steam Navigation Co., [1866] 2 Eq. 1, Balch-y-Pawn Lead Mining Co., [1868] 17 L. T. 35; Anglo-Egyptian Steam Navigation Co., [1869] 8 Eq. 660, 21 L. T. 19.

⁹ *Ex parte* Fox, [1871] 6 Ch. 173, 184.

¹⁰ Union Hill Silver Co., [1870] 22 L. T. 402.

¹¹ Bowes v. Hope Life Insurance &c. Co., [1865] 11 H. L. C. 389; London Suburban Bank, [1871] 6 Ch. 611; Cragglestone Coal Co., [1906] 2 Ch. at page 333. *Re Chic, Limited*, [1905] 2 Ch. 345.

The old rule was that the Court would not make a winding-up order where no good result could follow: *e.g.* where the whole of the assets were taken by the debenture holders under their security¹; by Section 141, however, this fact alone will not now be a reason for refusing an order, but, as it may form part of an objection, the old practice is here stated. The burden of showing that no possible benefit could accrue to the unsecured creditors was on those who asserted it, and the opportunity of being represented effectively in the debenture holders' action was a matter to be considered.² Where debenture holders claimed the assets, and the same persons were shareholders and debenture holders, the Court scrutinised the circumstances before refusing an order,³ and would make an order where the circumstances in which the receiver for the debenture holders was carrying on the company's business rendered it desirable that the company should be brought to an end,⁴ as for instance where the chairman of the company was the principal creditor for whose benefit the business was carried on and opposed the petition⁵; or if an investigation under Section 8 of the Winding-up Act, 1890, appeared likely to produce some advantage.⁶ On the other hand, after it was held that there could only be a public examination of the persons reported to be guilty of fraud, the Court did not so readily treat the possibility of an investigation as a ground for winding up compulsorily.⁷

Section 141 of the Act now enacts that an order to wind up shall not be refused on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets.

Under The Companies (Foreign Interests) Act, 1917, the Court has power to refuse an order when the company has adopted Articles restricting the interests or the authority or control which aliens may have or exercise, if it is of opinion that the winding-up is sought for the purpose of continuing the business free from these restrictions, or may impose conditions on the winding-up. The purpose of this provision is no doubt to avoid a compulsory order being obtained on the petition of the company or by

¹ Chapel House Colliery Co., [1883] 24 Ch. D. 259, Edgbaston Brewery Co., [1893] 68 L. T. 341.

² Crigglestone Coal Co., [1906] 2 Ch. 327.

³ London Health Electric Institute, [1897] 76 L. T. 98.

⁴ Chic, Limited, [1905] 2 Ch. 345; Alfred Melsom & Co., [1906] 1 Ch. 841.

⁵ Clandown Colliery Co., [1915] 1 Ch. 309.

⁶ Krasnapolsky Restaurant Co., [1892] 3 Ch. 174; General Phosphate Corporation, [1893] W. N. 142, *re* 1897 Jubilee Sites Syndicate, [1899] 2 Ch. 204.

⁷ *Per* Vaughan Williams, J., in *re* Thomas Edward Brinsmead & Sons, [1897] 1 Ch. at page 50.

collusion with a creditor. In cases where such restrictions exist a resolution to wind up voluntarily is ineffective unless authorised or ratified by the Board of Trade.

In deciding whether to order a compulsory winding up or one under supervision, or to allow a voluntary winding up to continue, as also in regard to other matters in a winding up, the Court will have regard to the wishes of the majority of creditors, and, if the debts are not likely to exhaust the assets, to the wishes of the majority of shareholders (Sections 145 and 201), and may direct meetings of creditors or shareholders to be held, giving directions as to the manner of holding the meetings (Section 219). If the company is insolvent, the assets belong to the creditors rather than the shareholders, and it is only by a compulsory order that they can get control.¹

In accordance with Sections 141 and 145 of the Act, a creditor's petition may be ordered to stand over² or be dismissed,³ or a supervision order made in place of a compulsory order⁴ at the wish of a majority of the creditors. For as between himself and the other creditors the petitioner is not entitled to a winding-up order as of right,⁵ although he has, as already stated, as between himself and a company not in voluntary liquidation, such a right whenever he brings himself within Section 129,⁶ subject to the rule that if the company can show that there is a better hope of payment by an adjournment the Court may, at the request of the company, adjourn the petition.⁷ The Court will not, as a rule, allow a petition to stand over against the wish of the company, for such a proceeding paralyses the business without achieving any good result.⁸

¹ *Isle of Wight Ferry Co.*, [1861] 2 H. & M. 507, *Lonsdale Vule Ironstone Co.*, [1868] 16 W. R. 601.

² For example, where there are hopes of an arrangement to carry on the company (*Brighton Hotel Co.*, [1868] 6 Eq. 330), or on good reason being assigned (*Great Western Coal Co.*, [1882] 21 Ch. D. 769), or where there is reason to believe debts would be paid (*Western of Canada Oil Co.*, [1874] 17 Eq. 1); or that no good result would be got from the winding up (*St. Thomas' Dock Co.*, [1876] 2 Ch. D. 110).

³ *Uruguay Central Railway Co.*, [1870] 11 Ch. D. 372; and, in cases where there was already a voluntary winding up, *Langley Mill Co.*, [1871] 12 Eq. 26; *Universal Drug Supply Association*, [1874] W. N. 125, and, where there was nothing to be gained by a winding up, *Chapel House Colliery Co.*, [1883] 24 Ch. D. 250.

⁴ *New York Exchange*, [1888] 39 Ch. D. 415; *Electrical Engineering Co.*, [1891] 64 L. T. 658.

⁵ *West Hartlepool Ironworks Co.*, [1879] 10 Ch. D. 618, *Uruguay Central Railway Co.*, [1870] 11 Ch. D. 372, *Great Western Coal Co.*, [1882] 21 Ch. D. 769, *Chapel House Colliery Co.*, [1883] 24 Ch. D. 250.

⁶ *London Suburban Bank*, [1871] 6 Ch. 641; *Western of Canada Oil Co.*, [1874] 17 Eq. 1; *Krasnapolsky Restaurant Co.*, [1892] 3 Ch. 174; *Bowes v. Hope Life Insurance &c. Co.*, [1865] 11 H. L. C. 389.

⁷ *Brighton Hotel Co.*, [1868] 6 Eq. 309, *Western of Canada Oil Co.*, [1874] 17 Eq. 1; *Great Western Coal Co.*, [1882] 21 Ch. D. 769.

⁸ *Chapel House Colliery Co.*, [1883] 24 Ch. D. 289.

The Court is, however, not bound by the wishes of the majority. The order may therefore be made against the wishes of a majority where a good case is made out: as, for instance, where the petition has stood over for three months and nothing has been done,¹ or where the opinion of the real majority is not ascertained,² or where a single person has a controlling influence.³

So the Court on a shareholders' petition will in general have regard to the wishes of a majority of shareholders, unless such majority consists of persons whose conduct is impugned or there are matters requiring investigation,⁴ or some plain injustice is being done to the petitioning shareholders which cannot be avoided except by a winding-up order.⁵

COMPULSORY ORDER WHERE THERE IS A VOLUNTARY WINDING UP.

Section 197 provides that the voluntary winding up of a company shall not bar the right of any creditor or contributory to have it wound up by the Court if the Court is of opinion that the rights of the creditor (*i.e.* the petitioning creditor) or in the case of a petition by a contributory the rights of the contributories will be prejudiced by a voluntary winding up. This rule prevails even when the voluntary winding up is commenced after the presentation of the petition.⁶ The old section, (145 of 1862) did not contain the provision as to contributories, but the new section gives effect to the decisions which had laid down that if the voluntary liquidation was procured by the preponderating influence and votes of persons whose conduct required investigation,⁷ or was begun with a view to a specific object which had failed,⁸ or if the Court was satisfied that the continuance of the voluntary winding up

¹ *Western of Canada Oil Co.*, [1874] 17 Eq. 1.

² *General Rolling Stock Co.*, [1866] 34 Beav. 314.

³ *Medical Battery Co.*, [1894] 1 Ch. 444, 448.

⁴ *West Surrey Tanning Co.*, [1866] 2 Eq. 737; *British Oil and Candle Co.*, [1866] 15 L. T. 601; *Varieties, Limited*, [1893] 2 Ch. 235; *General Phosphate Corporation*, [1893] W. N. 142; *Berlin Great Market Co.*, [1871] 24 L. T. 773, 19 W. R. 793.

⁵ *Professional Building Society*, [1871] 6 Ch. 856; *City and County Bank*, [1875] 10 Ch. 470.

⁶ *New York Exchange*, [1888] 39 Ch. D. 415; *Russell, Corder & Co.*, [1891] 3 Ch. 171; *re Medical Battery Co.*, [1894] 1 Ch. 444; *Doré Gallery*, [1891] W. N. 98. *re Greenwood & Co.*, [1900] 2 Q. B. 306.

⁷ *Varieties, Limited*, [1893] 2 Ch. 235, *re 1897 Jubilee Sites Syndicate*, [1899] 2 Ch. 204; *re Haycraft Gold Reduction Co.*, [1900] 2 Ch. 230. It is a contempt of Court while a petition for compulsory winding up is pending to obtain by improper means a resolution for a voluntary winding up with a view to mislead the Court as to the real views of the shareholders and thereby induce the Court to abstain from making a compulsory winding-up order (*Septimus Parsonage & Co.*, [1901] 2 Ch. 665).

⁸ *Re Gutta Percha Corporation*, [1900] 2 Ch. 665.

was likely to prejudice the shareholders and that benefit would result from a winding up by the Court a compulsory order would be made.¹

An unfair and improper sale to a new company, sanctioned under Section 192 by a majority who have other interests to serve, will be a ground for a compulsory order on the petition of the 'objecting minority of shareholders.'²

It is to be observed that in the new section prejudice to the rights of "the creditor"—i.e. the petitioning creditor—must be shown, but in the case of a shareholders' petition it is the rights of the contributories generally that are material.

The petition of the creditor or contributory must be presented before the company is dissolved under the voluntary liquidation; otherwise the Court has no jurisdiction to make the order, except perhaps in a case where the dissolution has been fraudulently procured,³ and it is sometimes alleged as a ground of prejudice that unless a compulsory order is made dissolution will take place and the creditors' rights will be defeated. Now, however, a dissolution may be re-opened at any time within two years (see page 537. *infra*).

It often happens that, although a voluntary liquidation is in progress, the resolution commencing it was not validly passed, in which case the Court makes a compulsory order at the instance of a creditor proving the fact. For instance, where the notice convening the meeting to pass the resolution for winding up was issued without the authority of a properly constituted board,⁴ or by the secretary on receipt of a requisition without waiting the necessary twenty-one days,⁵ or where the chairman made an obviously incorrect declaration of the result of the voting,⁶ it was held that no voluntary winding up existed, and a compulsory order was made. Where, however, a meeting was held without

¹ *National Company for the Distribution of Electricity*, [1902] 2 Ch. 34. But *Vaughan Williams, L.J.*, said, "The jurisdiction is one which the Court ought not too easily to exercise", and *Stirling, L.J.*, said, "The Court ought to be very careful how it exercises this jurisdiction."

² *Consolidated South Rand Mines*, [1909] 1 Ch. 491.

³ *Pinto Silver Mining Co.*, [1878] 8 Ch. D. 415, *London and Caledonian Marine Insurance Co.*, [1879] 11 Ch. D. 140.

⁴ *Re Haycraft Gold Reduction Co.*, [1900] 2 Ch. 230. In *Boschoek Co. v. Fuke*, [1906] 1 Ch. 118, *Swinfen Eady, J.*, held that when the number of directors was less than the minimum number allowed by the Articles, they could still, by a resolution otherwise duly passed, direct the summoning of a general meeting by the secretary.

⁵ *Re State of Wyoming Syndicate*, [1901] 2 Ch. 431.

⁶ *Carntal (New) Mines*, [1902] 2 Ch. 498. In this case *Buckley, J.*, held the chairman's declaration not conclusive, for he gave the figures, which of themselves showed that the resolution had been lost.

notice, but all the shareholders attended, a Divisional Court held that the shareholders could waive the formalities as to notice, and the resolution for winding up was valid.¹

If a majority of the creditors desire a compulsory order, the Court has jurisdiction to make such an order without proof that the voluntary winding up will prejudice them, for Section 197 must be read with Sections 145 and 201.²

From a consideration of a number of cases, many of which are not reported, it may be said that the practice of the Court is to make a compulsory order even where there is a voluntary winding up, notwithstanding the fact that there is little chance of any assets being available for the class represented by the petitioner, if satisfied that the promotion or conduct of the affairs of the company has been thoroughly fraudulent, so that an investigation by the Official Receiver is desirable in the public interests. If only an isolated case of improper dealing by the directors is shown, the Court will leave the petitioner to seek his remedy by proceedings for misfeasance in the voluntary winding up under Section 215. Account will, however, be taken of whether the voluntary liquidator is an independent person, likely to sift the alleged misdeeds with an impartial mind.³

But where fraud is relied upon it must be specially alleged in the petition and proved by an affidavit stating the specific matters relied upon. The statutory affidavit is not sufficient.⁴ Moreover, it is a general rule that a general allegation of fraud, however strong the words, where there is no statement of the circumstances relied on as constituting the alleged fraud, is insufficient even to amount to an averment of fraud of which any Court ought to take notice⁵; and, on the other hand, "No rule is more clearly settled than that fraud must be distinctly alleged and as distinctly proved, and that it is not allowable to leave fraud to be inferred from the facts."⁶

Where an order is made to wind up compulsorily a company already in voluntary liquidation, the Court has power to adopt any of the proceedings in the voluntary liquidation (Section 198); but if it does not do so all such proceedings are void.⁷ Even

¹ *Oxley Motor Co.*, [1921] 3 K. B. 32.

² *Re Bishop & Sons*, [1900] 2 Ch. 251; followed by *Parker, J.* (*Hormann Lechenstein & Co.* [1907] 23 T. L. R. 424).

³ *Re Varieties, Limited*, [1893] 2 Ch. 235. *Swinfen Eady, J.*, made an order for supervision only in the case of the *Vanguard Motorbus Company*, [1909] *Times*, 12th February, being satisfied with the liquidator's conduct.

⁴ *London and Hull Soap Works*, [1907] W. N. 254.

⁵ *Wallingford v. Mutual Society*, [1880] 5 App. Ca. 685.

⁶ *Per Thesiger, L. J.*, in *Davy v. Garrett*, [1878] 7 Ch. D. 480.

⁷ *Taurine Co.*, [1884] 25 Ch. D. 118, explaining *Thomas v. Patent Lionite Manufacturing Co.*, [1881] 17 Ch. D. 250.

where there has been a pre-existing voluntary winding up, in cases where a compulsory order is made the winding up commences from the date of the presentation of the petition for winding up by the Court,¹ a rule which sometimes affects the rights of the parties: *e.g.* past members may escape by reason of a year having elapsed since they ceased to be members,¹ or fraudulent preferences may have become unimpeachable.²

WHO MAY PRESENT A PETITION TO WIND UP.

The petition for winding up the company may (Section 137) be presented by—

1. The company itself, acting through its directors in pursuance of a resolution of the shareholders,³ or, if the company is in voluntary liquidation, by its liquidator⁴;
2. One or more of its creditors; or
3. One or more of its contributories;

Or by all or any of those parties together or separately

By Section 137, Sub-section 2, the Official Receiver may petition for the winding up of a company where the voluntary winding up or winding up under supervision “cannot be continued with due regard to the interests of the creditors or contributories.”⁵

By Section 15 of The Assurance Companies Act, 1909, any ten or more policy holders owning policies of an aggregate value of £10,000 can petition for the winding up of an assurance company, but only on showing a *prima facie* case, and obtaining the leave of the Court, and giving security for costs. Apart from this provision, it would seem that a holder of a policy of assurance, as being a contingent or prospective creditor, could petition under Section 130, Paragraph iv., of the Companies Consolidation Act, but that the effect of this section will be to limit such right, so that the petition must be by not less than ten policy holders owning policies for £10,000.⁶

¹ *Taurine Co.*, [1884] 25 Ch. D. 418. From *West Cumberland Iron and Steel Co.*, [1889] 40 Ch. D. 361, it appears the Court has no power to alter the date from which the liquidation is to commence.

² *Russell Hunting Record Co.*, [1910] 2 Ch. 78.

³ The directors must not petition without the sanction of a resolution, but if they have done so the company in general meeting can ratify their action (*re Galway and Salthill Tramways Co.*, [1918] 1 L. R. 62).

⁴ *Zoedone Co.*, [1881] 53 L. J. Ch. 465. Note.—The company's funds must not be applied in paying costs of a petition presented by a majority of the directors against the wishes of others and of a number of the shareholders (*Smith v. Duke of Manchester*, [1883] 24 Ch. D. 611).

⁵ Such a petition was allowed in *re 1897 Jubilee Sites Syndicate*, [1899] 2 Ch. 204, the company being already in voluntary liquidation.

⁶ See *British Equitable Bond Corporation*, [1910] 1 Ch. 574.

A creditor may petition, whatever the amount of his debt, and whether or not he is a secured creditor,¹ and whether he is the original creditor or only an assignee of the debt,² or is a creditor at law or only in equity,³ and a person becoming a creditor during the voluntary liquidation may petition for a compulsory order.⁴ The assignee of a part of a debt is a creditor in equity and may petition, but he cannot, without the concurrence of the owner of the residue of the debt, serve an effective demand for payment, and must prove the company's inability to pay its debts in some other manner.⁵

The Court will now, under Section 130, Paragraph iv., take into account the contingent and prospective liabilities of the company, and any contingent or prospective creditor of the company will be entitled to petition⁶; but the petition will not be heard until security for costs has been given and a *prima facie* case for winding up established to the satisfaction of the Court (Section 137, Sub-section 1 (c)).

A person who has obtained a garnishee order against the company is not a creditor of the company, and cannot petition for its winding up⁷; but he may obtain a judgment and then petition.⁸ A creditor whose debt is attached cannot petition,⁹ nor can an unpaid vendor of land until his title is accepted,¹⁰ nor a surety who has paid nothing,¹¹ nor a person who has a claim for unliquidated. The latter must first obtain a judgment on his claim. A judgment creditor may petition although an appeal is pending against his judgment.¹²

¹ *Moor v. Anglo-Italian Bank*, [1879] 10 Ch. D. 681; *Borough of Portsmouth &c. Tramways Co.*, [1892] 2 Ch. 302; *Great Western Coal Co.*, [1882] 21 Ch. D. 769. The secured creditor does not in any way invalidate his security by petitioning (see cases cited above), but he must not exercise his power of sale pending the hearing of the petition (*Cambrian Mining Co.*, [1881] W. N. 125, 20 W. R. 881).

² *Paris Skating Rink Co.*, [1877] 5 Ch. D. 959. An equitable assignment will suffice (*Montgomery Moore Syndicate*, [1903] W. N. 121, 72 L. J. Ch. 624, 80 L. T. 126).

³ *Combined Weighing and Advertising Co.*, [1889] 43 Ch. D. 99, 105; *Law Courts Chambers*, [1889] W. N. 189.

⁴ *Bank of South Australia*, [1895] 1 Ch. 578.

⁵ *Steel Wire Company*, [1921] 1 Ch. 349.

⁶ It was otherwise before the Act of 1907 (except as provided by the Assurance Companies Act). See *Melbourne Brewery Co.*, [1901] 1 Ch. 453.

⁷ *Combined Weighing Machine Co.*, [1889] 43 Ch. D. 99.

⁸ *Pitchell v. English and Colonial Syndicate*, [1899] 2 Q. B. 428.

⁹ *European Banking Co.*, [1860] 2 Eq. 521.

¹⁰ *Milford Docks Co.*, [1883] 23 Ch. D. 202.

¹¹ *Vron Colliery Co.*, [1882] 20 Ch. D. 442.

¹² *Pen-y-Van Colliery Co.*, [1877] 6 Ch. D. 477.

¹³ *Amalgamated Properties of Rhodesia*, [1917] 2 Ch. 115. The Court of Appeal in this case stayed the Order upon the company giving security for the amount of the debt.

A petition by a debenture holder to whom money is presently due is good, whether the debenture be registered or to bearer¹; if the money is not due, he must give security and establish a *prima facie* case as above mentioned. The existence of a trust deed, however, will be a bar if there is no direct obligation to make payment to the debenture holder,² for a covenant with trustees to pay the amount of the stock does not make the stockholder a creditor, nor does the printing of the conditions on the back of the debenture constitute a contract with the holder if they are not referred to on the face of the debenture.³

If the debt is a disputed one and the company is not shown to be insolvent, the Court may dismiss the petition⁴; or if the dispute appears to be *bona fide* on both sides, the petition may be adjourned for the question of liability to be determined⁵; and where the judgment in favour of the petitioner has been reversed the petition will be dismissed, although a further appeal is pending.⁶

If the petition for winding up is presented by a creditor whose debt exceeds £50, and is presently due, and it is shown that the company cannot pay its debts, it is almost a matter of course that the Court will make the order desired, for this is his right⁷ unless other creditors oppose, when the Court should have regard to the wishes of the majority⁸ (see page 477, *supra*).

As to a petition by a creditor whose debt is under £50 see page 472, *supra*.

A "contributory" is a person liable to contribute to the assets of the company in the event of a winding up, and for the purpose of petitioning also includes any person alleged to be a contributory (Section 124) and, notwithstanding Sub-section 1 (iv.) of Section 123, a holder of fully paid shares.⁹ A contributory of a company registered under the Acts, not being an original allottee, cannot, except where the number of members is reduced below the minimum of two or seven, petition unless he has held his shares and had them registered in his name for six months during the

¹ Chapel House Colliery Co., [1883] 24 Ch. D. 259; Olthe Silver Mining Co., [1884] 27 Ch. D. 278.

² Uruguay Central Railway Co., [1879] 11 Ch. D. 372.

³ Dunderland Iron Co., [1900] 1 Ch. 446.

⁴ *Re* Gold Hill Mines, [1883] 23 Ch. D. 210; London and Paris Banking Corporation, [1875] 19 Eq. 444; Rhodesian Properties, [1901] W. N. 130.

⁵ Catholic Publishing Co., [1864] 33 L. J. Ch. 325, King's Cross Industrial Dwellings Co., [1871] 11 Eq. 149.

⁶ Anglo-Bavarian Steel Bull Co., [1899] W. N. 80.

⁷ *Bowes v. Hope Life Insurance &c. Co.*, [1835] 11 H. L. C. 380, 35 L. J. Ch. 574; Chapel House Colliery Co., [1883] 24 Ch. D. 270.

⁸ Sections 145 and 201.

⁹ Anglesea Colliery Co., [1866] 1 Ch. 555; National Savings Bank Association, [1866] 1 Ch. 547.

eighteen months previous to the winding up, or has acquired them by devolution on the death of the previous holder (Section 137, Sub-section 1 (a)).¹ A contributory whose shares are fully paid up is entitled to petition,² but only if there is a reasonable probability that there will be assets to divide among the contributories.³ If he himself alleges in the petition that there are no assets, his petition will be dismissed with costs on the preliminary objection being taken,⁴ and a contributory who has not paid his calls will only be allowed to petition under very special circumstances,⁵ and is usually required to pay the amount of his unpaid calls into court.

The executor of a creditor⁶ or shareholder⁷ may petition, and where a petitioner dies while the petition is pending his personal representative may obtain an order to carry on the proceedings.⁸ The petition by an executor may be filed before probate is obtained,⁹ but probate must be got before the hearing,⁹ for the petitioner's title cannot otherwise be proved.

A contributory can obtain a compulsory order for winding up a company in voluntary liquidation where he shows that the rights of the contributories are prejudiced by the continuance of the voluntary liquidation (see page 479, *supra*). Such an order was made where an unfair scheme of reconstruction had been forced through by an interested majority.¹⁰

A provision in the Articles restricting the right of members to petition for a winding up is inoperative,¹¹ for a statutory right cannot be taken away by Articles.

A petitioner residing out of the jurisdiction¹² (and in England this applies to Scotland¹³), or who does not give an address at

¹ This provision renders it impossible for a holder of share warrants to bearer (not being an original allottee) to petition (*Wala Wynaad Co.*, [1882] 21 Ch. D. 839). The section declares the registration in the name of a trustee to be equivalent to registration in the name of the *cestui que trust*, and where a company neglected to register persons who had established their title for more than six months they were held entitled to petition (*Patent Steam Engine Co.*, [1878] 8 Ch. D. 404). But persons entitled to an allotment who had not received it were held not entitled to petition (*re A Company*, [1891] 2 Ch. 249).

² *National Savings Bank Association*, [1866] 1 Ch. 547; *re Gold Co.*, [1879] 11 Ch. D. 701; *National Company for the Distribution of Electricity*, [1902] 2 Ch. 33.

³ *Diamond Fuel Co.*, [1879] 13 Ch. D. 400; *Rica Gold Washing Co.*, [1879] 11 Ch. D. 36; *Doré Gallery*, [1891] W. N. 98. But these cases must be read now in the light of Section 141, which allows an order to be made where the company has no assets.

⁴ *Kaslo Slovan Mining Corporation*, [1910] W. N. 13.

⁵ *Crystal Reef Gold Mining Co.*, [1892] 1 Ch. 408.

⁶ *United Club Co.*, [1889] 60 L. T. 665; *W. Powell & Sons*, [1892] W. N. 94.

⁷ *Norwich Yarn Co.*, [1849] 12 Beauv. 306.

⁸ *Dynevor Collieries*, [1878] W. N. 199.

⁹ *Masonic Assurance Co.*, [1886] 32 Ch. D. 373.

¹⁰ *Consolidated South Rand Mines*, [1909] 1 Ch. 401.

¹¹ *Peveril Gold Mines*, [1898] 1 Ch. 122.

¹² *Home Assurance Association*, [1871] 12 Eq. 112.

¹³ *East Llanguynor Lead Co.*, [1875] W. N. 81; *Fontaine's Case*, [1889] 41 Ch. D. 118.

which he can be found,¹ or who has filed his petition in bankruptcy,² can be compelled to give security for costs. If the petitioner be another company in liquidation, security will be ordered unless the petitioner is shown to be able to pay the costs.³ If a petitioner be a judgment creditor in a sufficient amount, security for costs will not be ordered, as the judgment debt will, as a cross claim, protect the company from loss if the petition is dismissed⁴; but if the company is already in voluntary liquidation, and debenture holders have taken all the assets, even a creditor whose debt is admitted will be ordered to give security,⁵ and a contingent or prospective creditor petitioning under Section 137, Sub-section 1 (c), is always required to give security.

If it appears that the petition is presented from improper motives, the Court has power to restrain its advertisement and all other proceedings, and in such a case will not allow the name of the company to transpire,⁶ or on an application made in time will restrain the presentation of the petition.⁷

There is a large number of cases which are sometimes cited as showing how the Court will exercise its discretion in particular circumstances. These do not bind the Court, and, as the circumstances are never identical in any two cases, it is useless to set them out. There are, moreover, many cases in regard to the rules as to the person who shall have the conduct of the proceedings which have become obsolete under the present practice.

An action will lie for maliciously presenting a petition, and no proof of special damage is necessary, for injury to the credit of a trading company will be assumed.⁸

MANNER OF OBTAINING A WINDING-UP ORDER.

The necessary steps for obtaining a Winding-up Order are as follows⁹ :—

1. Present at the office of the Registrar a petition showing the capital, objects, and nature of the company, the title of the petitioner to present the petition, and the

¹ *Sturgis Motor Syndicate*, [1875] W. N. 218, 53 L. T. 715.

² *Carta Para Co.*, [1892] 19 Ch. D. 457.

³ Section 278; *Pure Spirit Co. v. Fowler*, [1890] 25 Q. B. D. 235.

⁴ *Contract Corporation*, [1887] W. N. 218.

⁵ *Alaluma Portland Cement Co.*, [1900] 25 T. L. R. 601.

⁶ *Re A Company*, [1894] 2 Ch. 349.

⁷ *New Travellers' Chambers v. Cheese*, [1894] 70 L. T. 271. *Circle Restaurant Co. v. Lavery*, [1880] 15 Ch. D. 555.

⁸ *Quartz Hill Mining Co. v. Eyre*, [1894] 11 Q. B. D. 674, 50 L. T. 274.

⁹ See *The Companies (Winding Up) Rules*, 1909.

circumstances on which reliance is placed for obtaining the order, following the form given in the Rules. The Registrar will appoint the time and place of hearing, notice of which must be written on the petition and sealed copies (Rule 26). Three copies are required, one of which must bear a two-pound stamp. This is the petition to be made an exhibit in the affidavits, and must be returned to the Registrar two clear days before the hearing. A sealed copy is used for service.

2. Advertise the petition seven clear days before the hearing in the *London Gazette* and in at least one local newspaper (Rule 27), using the form given in the Rules, stating the names and addresses of the petitioner and his solicitor and London agent (if any), and the day on which the petition was presented, and containing the note set out in the form,¹ and within four days file an affidavit (which must as an almost invariable rule be made by the petitioner himself, or if the petitioner is a corporation by one of its officers) verifying the facts stated in the petition (Rule 29). If affidavits other than the statutory one are filed notice must be given to the company.²
3. Unless the petition is presented by the company itself, serve it at the registered office³ (or, if none, at the principal place of business) of the company on some member, officer, or servant of the company, and, if the company is already in voluntary liquidation, also upon the liquidator (Rule 28).⁴ If there is no appearance by the company at the hearing, service of the petition must be proved by affidavit.⁵

¹ If this note is omitted the petition must be re-advertised (*Hille India Rubber Co.*, [1897] W. N. 6). If the petition is not duly advertised within the prescribed time the appointment for hearing the petition is cancelled and the petition removed from the file (Rule 27). This provision was added in 1909.

² Practice Direction, [1898] W. N. 7, *British Cycle Manufacturing Co.*, [1897] 77 L. T. 683.

³ If the company has no registered office, service on directors and secretary at an unregistered office will suffice (*Fortune Copper Mining Co.*, [1871] 10 Eq. 330). But generally application should be made *ex parte* to the Court for directions as to how service is to be effected, and service on directors and secretary will usually be ordered (*National Credit Co.*, [1863] 11 W. R. 161, 7 L. T. 817; *South Essex Estuary*, [1868] 18 L. T. 178); or if there are no such officers, then on the signatories of the Memorandum (*Velletti Co.*, [1868] 18 L. T. 350).

⁴ Unless the petition is by the company itself (*Chester & Co.*, [1901] 52 W. R. 189).

⁵ Unless the company's duly authorised solicitor has accepted service (*Regent United Service Stores*, [1878] 8 Ch. D. 75). If service is effected by leaving the petition in the letter-box the affidavit must state not only that no officer or servant of the company but also that no member of the company was to be found (*re Hatcham Motor Garage Co.*, [1916] W. N. 162).

4. Go before the Registrar on a day appointed by him to satisfy him that the Rules have been complied with. No order will be made unless this has been done (Rule 32).
5. If the petition is by a prospective or contingent creditor, he must give security for costs and establish a *prima facie* case to the satisfaction of the Court.
6. Affidavits in opposition to the petition may be filed within seven days of the filing of the affidavit in support, and in such case notice of the filing must be given to the petitioner and his solicitor, who may, within three days of receiving the notice, file affidavits in reply (Rule 35).
7. The hearing will take place in open court on the day appointed (see page 491, *infra*). The petitioner must hand in, before the hearing commences, the list of those who support or oppose the petition (see page 491, *infra*).

The petition must contain the name, address, and description of the petitioner,¹ and all allegations necessary to show that the company ought to be wound up. If any material matter is omitted, a preliminary objection (in the nature of a demurrer) may be taken at the hearing, and it may become necessary to adjourn the hearing and amend the petition, the petitioner being sometimes ordered to pay the costs thrown away. The fact that the petitioner, if a shareholder, is an original allottee or has held his shares for six months, may be proved by affidavit.²

The petition ends with the allegation that it is just and equitable that the company should be wound up. This allegation will not suffice unless the other facts stated bear it out,³ and if the petitioner relies upon fraud or misconduct of the directors or others as a ground for the winding up, the facts must be specifically stated in the petition and proved by the affidavits. A vague or general allegation is not sufficient,⁴ nor is it enough to file only the statutory affidavit.⁵

If the company is in voluntary liquidation the fact must be stated, with the reasons why it prejudicially affects the petitioner.

¹ See Forms 4 and 5. If the address is not given, security for costs will be ordered (*Sturgis Motor Syndicate*, [1875] 53 L. T. 715).

² *City and County Bank*, [1875] 10 Ch. 400, (*Glendower Steamship Co.*, [1889] W. N. 114. It is better, however, also to allege the fact in the petition.

³ *Wear Engine Works*, [1879] 10 Ch. D. 188.

⁴ *Rica Gold Washing Co.*, [1879] 11 Ch. D. 36; *Wallingford v. Mutual Society*, [1880] 5 App. Ca. 685.

⁵ *London and Hull Soap Works*, [1907] W. N. 251.

The advertisement of the petition is a matter of importance: it must be seven *clear* days before the hearing; an advertisement in Tuesday's *Gazette* is therefore not sufficient in case of the hearing being fixed for the following Tuesday. But the Court may reduce the time or waive any irregularity (see Rules 216 and 217),¹ but does not usually do so unless there are special circumstances.² If only a compulsory order is asked for in the petition as advertised, the Court will not make a supervision order without re-advertisement.³ If the alternative claim is advertised, that will suffice.⁴

The omission of the note in Form No. 6 as to persons appearing is important and will render re-advertisement necessary,⁵ and a mistake in the name of the company, even if trivial, or the omission of the word "Limited,"⁶ will not be allowed to pass without re-advertisement⁷; but a trifling mistake, as wrongly stating the date by which notices of opposition are to be given or a trifling error in spelling the company's name, may be allowed to pass.⁸

The advertisement is notice to all the world of the presentation of the petition, but only as from such time as they may reasonably be supposed to have seen it.⁹

The Court will on an application made in the proceedings restrain the advertisement of a petition not presented in good faith,¹⁰ and will punish as a contempt an abuse of the occasion: *e.g.* an advertisement at length of a petition containing charges of fraud,¹¹ or comments on the conduct of the directors, published in the public press during the pendency of the petition.¹² But it is not contempt to circulate *among persons interested* arguments or statements regarding the matter before the Court.¹³

¹ *MacLean & Co.*, [1881] W. N. 8; *City and County Bank*, [1875] 10 Ch. 470.

² *London India Rubber Co.*, [1866] 14 L. T. 316.

³ *New Oriental Bank Corporation*, [1892] 3 Ch. 563; *Practice Note*, [1902] W. N. 77.

⁴ *Civil Service Brewery*, [1893] W. N. 5.

⁵ *Hille India Rubber Co.*, [1897] W. N. 6; *Mont de Piété*, [1892] W. N. 166.

⁶ *London and Provincial Pure Ice Co.*, [1901] W. N. 136.

⁷ *City and County Bank*, [1875] 10 Ch. 470; *Army and Navy Hotel, Limited*, [1886] 31 Ch. D. 644; *The Samuel Birch Co.*, [1907] W. N. 31.

⁸ *Saul Moss & Sons*, [1906] W. N. 142; *Broad's Patent Night Light Co.*, [1892] W. N. 5; *L'Industrie Verriere, Limited*, [1914] W. N. 222.

⁹ *Emmerson's Case*, [1866] 2 Eq. 231; *re Oriental Bank Corporation, ex parte Guillemin*, [1885] 28 Ch. D. 640; *New Gas Co.*, [1877] 5 Ch. D. 703; *Marlborough Club Co.*, [1866] 1 Eq. 216, 35 L. J. Ch. 146.

¹⁰ *Re A Company*, [1894] 2 Ch. 340.

¹¹ *Cheltenham and Swansea Railway Co.*, [1869] 8 Eq. 580.

¹² *Re O'Malley*, [1890] 44 Ch. D. 619.

¹³ *London Flour Co.*, [1867] 17 L. T. 636, 16 W. R. 474; *New Gold Coast Co.*, [1901] 1 Ch. 860.

The original affidavit in support of the petition must be made by the petitioner, or by one of the petitioners if there are more than one, or in case a corporation is petitioner by some director, secretary, or other principal officer. An affidavit by a solicitor or agent knowing the facts will be accepted if the petitioner is abroad, or for other good reason¹; but if the petitioner is in Europe his absence will not alone be enough to excuse his making the affidavit. The deponent is only required to swear to the truth of the petition in general terms, and to depose in regard to the acts and deeds of persons other than himself that he *believes* them to be true; but "such affidavit shall be sufficient *prima facie* evidence of the statements in the petition" (Rule 29). This gives a petitioner the advantage of being able to give legal proof of the essential matters on hearsay. But if any charge of misconduct or fraud is made in the petition against directors or others it is not the practice of the Court to be content with the statutory affidavit,² and a further and more detailed affidavit, setting out the particular fraud charged, is required to be made by some person having personal knowledge of the facts, and notice must be given of the filing of such affidavit.³ The times for filing evidence are—Original or statutory affidavit, within four days after the petition is presented; Affidavits in opposition, within seven days of the date on which the statutory affidavit is filed; Affidavit in reply, within three days of the date on which notice of the filing of the evidence in opposition is given. But, unless the Court considers the delay to have been intentional or unreasonable, further time is usually granted for the purpose of filing the proper evidence, although sometimes under penalties as to costs.

In a proper case the Court will direct the deponents to attend in court for the purpose of being cross-examined in respect of their evidence. The application for this is properly made by summons, but is often made in court on the first occasion when the petition is in the list for hearing.

Other persons who intend to appear at the hearing must, before six o'clock on the previous day, give notice to the petitioner in the form given in the Rules, stating their names,

¹ *Per* Warrington, J., in *African Farms, Limited*, [1906] 1 Ch. 640, not following *Charterland Stores and Trading Co.*, [1900] 2 Ch. 870.

² *London and Hull Soap Works*, [1907] W. N. 254; *Ilfracombe Permanent Mutual &c. Building Society*, [1901] 1 Ch. 110.

³ *South Staffordshire &c. Tramways Co.*, [1894] Mans. 292, *Practice Direction*, [1898] W. N. 7, *British Cycle Manufacturing Co.*, [1897] 77 L. T. 683. The circumstances relied upon must be specifically stated a general allegation of fraud will not suffice to induce the Court to take action (*Wellingford v. Mutual Society* [1880] 5 App. Cas. 685).

addresses,¹ and the amount of their claims, and whether they support or oppose the petition. Thus other creditors or contributories may appear to support or oppose a petition presented by unsecured creditors or contributories. Debenture holders seldom appear, and are little considered, for they have another complete remedy; but if a winding up would prejudicially affect them this may be a ground for refusing to make the order.² No person failing to give notice can appear at the hearing without special leave of the Court (Rule 33). Such leave is usually given, but no costs are allowed to the person in default. The object of this notice is to enable the Court to know who support or oppose the petition, and to put an end to a practice once prevalent of persons attending and siding at the last moment with the victorious party to secure a share of the costs.

Where creditors and contributories appear to support or oppose they may file evidence, but they are not entitled as of right to the costs of such evidence, and should apply at the hearing to have them allowed.³

The petitioner must (under penalty of losing the costs of his solicitor's attendance at the hearing)⁴ prepare and furnish the Court with a list of the names and addresses¹ of those who have given notice of intention to appear, stating whether they support or oppose (Rule 34 and Form 12). This list must include any persons represented by petitioner's own solicitor, although they have not given formal notice to appear.⁵

Every petition is heard in court. In the High Court a regular day in the week (at present Tuesday) is fixed for hearing petitions to wind up companies, but if necessary other days are appointed. The company must appear (if at all) by counsel, or (in a County Court) by a solicitor. It sometimes happens when there is a dispute between directors that one side alleges that the company has given no authority for opposition to the petition. The Court will not listen to such an objection at the hearing, but assumes that the solicitor has authority to appear and instruct counsel for the company, unless proceedings have been taken by summons or motion to dispute his authority.⁶ Parties other than the company (*i.e.* the petitioner and creditors

¹ The addresses must not be omitted (*Descours, Parry & Co.*, [1909] W. N. 50).

² *Dunderland Iron Ore Co.*, [1909] 1 Ch. 446.

³ *Ibo Investment Trust*, [1904] 1 Ch. at page 31.

⁴ Practice Direction, [1906] W. N. 127.

⁵ *Re Invieta Works*, [1894] W. N. 39.

⁶ This practice is well known, but has seldom appeared in reported cases. *Warrington, J.*, discusses the practice in an action (*Richmond v. Branson & Son*, [1914] 1 Ch. 905); but in *Daimler Co. v. Continental Tyre Co.*, [1916] 2 App. Ch. 307 it was held that if at the hearing of an action it appears that the plaintiff could not have authorised the action it ought to be struck out.

or contributories appearing to support or oppose) may appear personally or by counsel, but only the petitioner and the company are entitled to be heard as of right in argument.¹ The Court, moreover, usually allows counsel for other parties to call attention to any material matters.

Section 141 provides that "on hearing the petition the Court may dismiss it with or without costs, or adjourn the hearing conditionally or unconditionally, or make any interim order, or any other order that it deems just." Adjournments to complete the evidence are freely allowed, but the costs are in the discretion of the Judge. A petition is often adjourned to allow of a reconstruction or the raising of money to pay off creditors; but the Court discourages prolonged or repeated adjournments, and often disallows any extra costs incurred.

A petitioner cannot take his case out of the list for hearing without leave of the Court,² and even when the company offers to satisfy the petitioner's debt and costs the Court will not allow the petition to be withdrawn without giving an opportunity for any other creditors to proceed with the petition or to require payment of their debts. Where a petitioner withdraws his petition he will be ordered to pay one set of costs to those supporting and one set to those opposing the petition.³

Several different petitions may be presented; but it is seldom advisable to do so, as if the first petitioner does not appear, or does not ask for an order, or consents to withdraw his petition or to allow it to be dismissed or adjourned, the Court may, on such terms as it thinks just, substitute any other creditor or contributory as petitioner (Rule 36),⁴ and where leave to withdraw a petition is asked may adjourn to see if any other creditor desires to proceed.⁵ A second petitioner will only be allowed the costs incurred down to the time when he first learned of the existence of an earlier petition.⁶ The costs of a petition properly presented are payable out of the assets of the company; and if a petitioning creditor receives payment of the amount of his debt, his costs up to the time of payment will usually be allowed him. The common order gives one set of costs to those supporting the successful party, unless they and

¹ *Ibo Investment Trust*, [1904] 1 Ch. 26.

² *Re An Insurance Co.*, [1875] 33 L. T. 49; *Anglo-Vancouver Land Co.*, [1880] W. N. 155.

³ *British Electric Street Tramways*, [1903] 1 Ch. 725.

⁴ *Re Invieta Works*, [1894] W. N. 39. Formerly if the petitioning creditor did not appear at the hearing there was no power to substitute another petitioner (*Vanguard Motorbus Co.*, [1908] W. N. 99); but an amendment has been introduced into Rule 36 to meet this case.

⁵ *Webb Manufacturing Co.*, [1895] 13 Rep. 55.

⁶ *Sheringham Development Co.*, [1893] W. N. 5. For rule as to costs of petition see *Cott and Jackson*, [1893] W. N. 184.

the successful party are represented by the same solicitor, in which case no additional costs are allowed for those supporting.¹ Equally, only one set of costs are allowed to creditors and contributories appearing by the same solicitor, but the taxing master may allow the costs of separate counsel in a proper case.² Even where directors are charged with fraud and succeed in repelling the charge, the costs allowed are very scanty, unless the Judge makes a special order.³

The winding-up order is drawn up by the Registrar, usually without making any appointment for the solicitors of the respective parties to attend (Rule 39). The Judge can rectify an order before it is drawn up,⁴ and can correct an order after it is drawn up if it does not express the intention of the Court.⁵ Any other application to vary or discharge an order after it is drawn up must be made by way of appeal.⁶ In the same way an objection to the jurisdiction of the Court—*e.g.* that the company was not one which the Court could wind up,⁷ or in the case of a supervision order that there was no voluntary liquidation⁸—must be made the subject of an appeal.

The order when made relates back to the date of the presentation of the petition (Section 139), from which date a compulsory winding up is deemed to commence, although this may affect the rights of the parties (see page 482, *supra*).

WINDING UP OF ASSURANCE COMPANIES.

It remains to take note of some special provisions regarding Assurance Companies.

An assurance company, if registered under the Companies Acts, or if consisting of more than seven members,⁹ has always been liable to be wound up under the Companies Acts,¹⁰ and since 1907 any "contingent or prospective creditor"¹¹ (which would include a policy holder) could petition. Section 15 of The Assurance Companies Act, 1909, enacts that "the Court may order the winding up of an assurance company" (which, as already stated, may consist of an individual, or a firm, or any

¹ *Re Brighton Marine Palace*, [1807] W. N. 12.

² *Silberhutte Supply Co.*, [1910] W. N. 81.

³ *Ibo Investment Trust*, [1904] 1 Ch. 26.

⁴ *Miller's Case*, [1876] 3 Ch. D. 661; *re St. Nazaire Co.*, [1879] 12 Ch. D. 88; *re Crown Bank*, [1890] 44 Ch. D. 634.

⁵ *Tucker v. New Brunswick Trading Co.*, [1890] 44 Ch. D. 249.

⁶ *Re St. Nazaire Co.*, [1879] 12 Ch. D. 88.

⁷ *Padstow Total Loss &c. Assurance Association*, [1882] 20 Ch. D. 137.

⁸ *Manchester Economic Building Society*, [1883] 24 Ch. D. 488.

⁹ See Section 267.

¹⁰ The petition must be entitled "In the matter of The Companies (Consolidation) Act, 1908," as well as "In the matter of The Assurance Companies Act, 1909."

¹¹ Companies Act, 1907, Section 28 (now Paragraph IV. of Section 130 of The Companies (Consolidation) Act, 1918).

number of persons) "in accordance with the provisions of The Companies (Consolidation) Act, 1908," subject, however, to certain modifications: viz. "The company may be ordered to be wound up on the petition of ten or more policy holders"—*i.e.* the legal holders of the policies for securing the contracts with the assurance company (Section 29 of the Act of 1909)—"owning policies of an aggregate value of not less than £10,000," and the petition must not be presented without leave of the Court, which leave will not be granted until a *prima facie* case is established and security for costs given.¹

It seems that this amounts to a prohibition of any petition by less than ten policy holders owning policies for £10,000,² but a shareholder or an ordinary creditor—as for instance a policy holder whose claim has matured and is unpaid—would not be precluded from petitioning and obtaining a winding-up order. Whether the petition be under the Assurance Companies Act or the ordinary jurisdiction, the Court, in determining whether the company can pay its debts, will take into account the contingent and prospective liabilities of the company.

It must be remembered that, in addition to the usual grounds of winding up, an assurance company may be wound up by the Court if default is made in compliance with any provision of the Assurance Companies Act and this default continues for three months after notice of default by the Board of Trade (Section 23 of the Assurance Companies Act).

The winding up of subsidiary assurance companies is dealt with in Section 16 of the Assurance Companies Act, and a subsidiary company is stated to be an assurance company which has transferred all or any part of its assurance business to another company (which is called the "principal company") upon terms under which the subsidiary (*i.e.* the transferring) company or its creditors have claims against the principal (*i.e.* the transferee) company, but this does not include the case of one company acquiring the bulk of the shares of another company appointing its directors and guaranteeing its policies.³ In the case of a subsidiary company, if the Court is of opinion that the winding up of the subsidiary company in conjunction with the principal company is just and equitable (Section 16, Sub-section 4, of the Assurance Companies Act), or if the subsidiary company is already in course of winding

¹ Where a company is being wound up voluntarily and a petition to wind up compulsorily is presented to the Court, it is not necessary that a *prima facie* case should be established before the hearing or security for costs given (see *British Alliance Insurance Corporation*, [1878] 9 Ch. D. 635).

² *British Equitable Bond Corporation*, [1910] 1 Ch. 574.

³ *Lancashire Plate Glass Insurance Co.*, [1912] 1 Ch. 35.

up, the Court *must* when the principal company is being wound up by or under the supervision of the Court "order the subsidiary company to be wound up in conjunction with the principal company, and *may* by the same or any subsequent order appoint the same person to be liquidator for the two companies, and make provision for such other matters as may seem to the Court necessary, with a view to the companies being wound up as if they were one company" (Sub-section 1).

It is to be presumed that if a company had transferred only a part of its business, and was successfully carrying on other parts of its business and was able to meet its liabilities, the Court would not consider any winding up "in conjunction with the principal company" "just and equitable," as the section, which was taken from Section 4 of The Life Assurance Companies Act, 1872, appears only to contemplate cases where the liabilities of the two companies are so intermingled as to render one administration desirable.

Section 17 and the Sixth and Seventh Schedules of the Assurance Companies Act provide rules for the valuation of the liabilities of a company being wound up under its policies, and for notice of the liability of the company on its policies to be given to the respective policy holders by the liquidator under the direction of the Court.

These valuations must be taken as at the commencement of the winding up, and the fact that a claim has emerged during the winding up: *e.g.* by a fire or an accident having occurred does not increase the claim of the assured person. Thus, in Fire and Employers' Liability Assurance the only right of an assured person when the event insured against has happened since the commencement of the winding up is to get back a proportion of his premium,¹ but a claim which emerged before the winding up commenced can be proved for in full.¹ Whether the amount at which a current policy is valued for proof can be set off against a debt from the policy holder to the company is perhaps doubtful.²

Section 18 of the Assurance Companies Act provides for the "Reduction of Contracts," and under its provisions the Court may, in the case of an assurance company which has been proved to be unable to pay its debts,³ instead of making a winding-up order "reduce the amount of the contracts of the company upon such terms

¹ *Law Car and General Insurance Corporation*, [1913] 2 Ch. 103. The rule laid down under the earlier Acts in *Macfarlane's Case*, [1880] 17 Ch. D. 337, was different, but no longer applies.

² In *Paddy v. Clutton*, [1920] 2 Ch. 554, Russell, J., following *ex parte Price*, [1875] 10 Ch. 618, with reluctance, held that there could be no set-off. But in *re National Benefit Assurance Co.*, [1921] 2 Ch. 339, Eve, J., considered *ex parte Price* to be distinguishable, and decided in favour of the set-off. It is submitted that the latter view is to be preferred.

³ This of course includes making provision for future and contingent liabilities.

• Rule 10), and must be served and the appeal entered within twenty-one days, calculated in the same manner as in appeals to the Court of Appeal (Rule 12). The entry is made by lodging a copy of the notice of motion at the Crown Office Department of the Central Office (Rule 11). The High Court has power to extend the time for appealing or to amend the ground of appeal (Rule 16). Security for costs may be ordered.¹

Any party who appeared in the Court of First Instance, including creditors or contributories supporting or opposing the petition, can appeal,² but creditors or contributories who did not appear cannot appeal without special leave.³ When the appeal is on behalf of the company it is conducted by the directors, although under the order appealed from the liquidator becomes the regular representative of the company⁴; but the Court will order substantial security for costs (say £100) to be given by the real appellants to prevent the company's assets suffering from an unsuccessful appeal,⁵ and if the appeal fails the appellant's costs will not be made payable out of the company's assets,⁶ and it has been suggested by Buckley, L. J., that "possibly" the directors might be made personally liable for costs of an unsuccessful appeal.⁷ The costs of various parties have been discussed in the Court of Appeal.⁸

In the case of an appeal against an order for winding up by the Court the Official Receiver should be served with the notice of motion.

PROCEEDINGS IN THE WINDING UP.

Section 147 requires that in England a "statement as to the affairs of the company" is to be prepared, submitted, and verified on oath within fourteen days from the winding-up order by one or more of the directors and the secretary or other chief officer of the company, or by such persons, being or having been directors, officers, or promoters of the company within the preceding year, as the Official Receiver may require. Any person without reasonable excuse making default is liable to a fine of ten pounds for every day during which the default continues,⁹ or the Official

¹ *Swain v. Follows*, [1887] 18 Q. B. D. 585.

² *Silkstone Fall Colliery Co.*, [1876] 1 Ch. D. 38.

³ *Securities Insurance Co.*, [1894] 2 Ch. 410.

⁴ *Diamond Fuel Co.*, [1879] 13 Ch. D. 400.

⁵ *Consolidated South Rand Mines No. 2*, [1909] W. N. 66; *Diamond Fuel Co.*, [1879] 13 Ch. D. 400; *Photographic Artists' Co-operative Supply Association*, [1883] 23 Ch. D. 370.

⁶ *National Savings Bank Association*, [1886] L. R. 1 Ch. 547.

⁷ *Consolidated South Rand Mines No. 2*, [1909] W. N. 66.

⁸ *Ibo Investment Trust*, [1903] 2 Ch. 373.

⁹ By Section 276 all offences under the Act punishable by fine may be prosecuted under the Summary Jurisdiction Acts. Accordingly the fine in question can now be and is in fact enforced by Police Court proceedings.

Receiver may upon summons obtain an order of Court upon the person in default, and failure to comply with such order is punishable as contempt of Court.¹

A person who is *de facto* a director can be required to make the statement, although his appointment may not have been regular.²

The statement must show the assets, debts, and liabilities of the company, the names, residences, and occupations of the creditors and the securities they hold, the dates when the securities were given, and be in the prescribed form, and must contain such further or other information as may be prescribed or as the Official Receiver may require.

Any person stating in writing that he is a creditor or contributory is entitled to inspect the statement on payment of the prescribed fee (one shilling); but it is a contempt of Court to make an untrue statement in this respect.

As soon as practicable after receipt of the statement of affairs the Official Receiver is required, in England, by Section 148, to submit to the Court a preliminary report—

- (A) As to the amount of capital issued, subscribed, and paid up, and the estimated amount of assets and liabilities; and
- (B) If the company has failed, as to the causes of the failure; and
- (C) Whether in his opinion further inquiry is desirable as to any matter relating to the promotion, formation, or failure of the company or the conduct of its business.

The same section deals with the further report which the Official Receiver may make, and Section 175 deals with the consequent public examination of officers charged with fraud. These are considered later (see page 579, *infra*). The preliminary report and statement of affairs are sent to the creditors and contributories. The above provisions (taken from the Winding Up Act, 1890) do not apply in Scotland or Ireland.

First Meetings of Creditors and Contributories.

In England, as soon as a winding-up order has been made, it is the duty of the Official Receiver to summon separate meetings of the creditors and contributories for the purpose of—

- (A) Determining whether or not an application is to be made to the Court for appointing a liquidator in the place of the Official Receiver; and

¹ *Columbian Gold Mines*, [1804] 42 W. R. 624, *New Par Consols*, [1808] 1 Q. B. 573.

² *New Par Consols*, [1808] 1 Q. B. 573.

- (B) Determining whether or not an application is to be made to the Court for the appointment of a committee of inspection to act with the liquidator, and who are to be the members of such committee if appointed (Section 152).

The Official Receiver may also require any directors and officers of the company to attend, and it then becomes their duty to be present (Rule 119).

The Act of 1890 contained in the First Schedule rules for the holding of these meetings. These are now replaced by provisions of the Companies Winding-Up Rules to the following effect:—

At this first meeting no creditor can vote unless his proof of debt against the company is lodged before the time appointed for the meeting, and no vote may be given in respect of an unliquidated or contingent debt, or any debt the value of which is not ascertained (Rule 133).¹ But this does not preclude a creditor for services rendered² or untaxed costs³ or the like proving and voting in respect of such amount as he can swear is the minimum sum due to him.

“A debt the value of which cannot be ascertained” means one dependent on the happening of some future event.⁴

The rule as to secured creditors (Rule 135)¹ is important, as failure to observe it may deprive the creditor of his security. It provides that, for the purpose of voting, a secured creditor shall, unless he surrenders his security, state in his proof particulars of his security, its date, and the value at which he assesses it, and he is entitled to vote only in respect of the balance (if any) due to him after deducting the value of his security. “*If he votes in respect of his whole debt he shall be deemed to have surrendered his security, unless the Court on application is satisfied that the omission to value the security has arisen from inadvertence.*” The Court is lenient in interpreting the proviso, but usually makes the creditor pay the cost of the application,⁵ but a mistake as to value is not “inadvertence,” nor can there be any “inadvertence” where there is a deliberate election,⁶ and if the position of the company has been altered in reliance upon the fact that no security is claimed relief will be refused.⁷

¹ Rules 133 and 135 do not apply in a voluntary winding up.

² Canadian Pacific Corporation, [1891] W. N. 122.

³ *Ex parte Ruffle*, [1873] 8 Ch. 997.

⁴ *Re Dunnmelow*, [1873] 8 Ch. 997.

⁵ *Ex parte Huddersfield Banking Co.*, [1892] 2 Ch. 417; *re Burr*, *ex parte Clarke*, [1892] 67 L. T. 465.

⁶ *Re Piers*, [1898] 1 Q. B. 627.

⁷ *Re Safety Explosives, Limited*, [1904] 1 Ch. 226. A solicitor's lien is such a security as should be valued (same case).

If a creditor holds a bill of exchange he must, for the purpose of voting, but not of dividend, estimate and deduct the value of the liability to him of any person (not being bankrupt) who is liable thereon antecedently to the company, and deduct it from his proof (Rule 134). The bill of exchange must be produced (Rule 100).¹

The Official Receiver or liquidator may, within twenty-eight days after a proof valuing a security has been used for voting purposes, require the creditor to surrender the security against payment of twenty per cent. more than the estimated value. The creditor has a right at any time before being required to surrender the security to amend his valuation, but in such case the addition of twenty per cent. will not be made in case of a surrender being required (Rule 136).¹

The chairman has power to admit or reject proofs for the purpose of voting, but this is subject to an appeal to the Court, or he may allow the vote subject to its being declared invalid on an objection being sustained (Rule 137).¹

Votes may be given personally or by proxy (Rule 139). A creditor who has assigned his debt after proof can still vote.²

The proxy form is sent out by the Official Receiver (Rule 141), and must be filled up in the handwriting of the person giving it, or by some person in his regular employment, or by a commissioner for oaths (Rule 140). The proxy must not be witnessed by the person appointed.³ The proxies must be lodged with the Official Receiver at the time named for such purpose in the notice convening the meeting (Rule 147 [1]).

If any canvassing for votes takes place on behalf of a liquidator the Court may disallow his remuneration (Rule 144), and no votes may be given by a proxy in favour of the appointment of himself or his partner or employer to any position, where remuneration is paid out of the estate of the company, except where the proxy is special and authorises him to vote in favour of his appointment as liquidator (Rule 146).

The chairman may, with the consent of the meeting, adjourn (Rule 131). Minutes must be kept (Rule 138), and are the only proper record of the proceedings.⁴ A quorum is three creditors or contributories, or if there be not so many then the whole number (Rule 132 [1]). If only one creditor has proved, and attends or is represented, he constitutes a quorum and can act, even though the Official Receiver has notice that there are other creditors who have not proved.⁵ If there is no quorum

¹ Rules 100, 136, and 137 do not apply in a voluntary winding up.

² *Re* Baum, [1880] 13 Ch. D. 424.

⁴ *Re* Radcliffe, [1875] 10 Ch. 631.

³ *Re* Parrott, [1891] 2 Q. B. 161.

⁵ *Re* Thomas, *ex parte* Warner, [1911] W. N. 123.

within half an hour the meeting must be adjourned for not less than seven or more than twenty-one days (Rule 132 [2]). When an important creditor has not been represented a fresh meeting may be called.¹

These provisions as to first meetings do not apply in Scotland or Ireland.

Other Meetings of Creditors and Contributories.

Under Section 219 the Court may, as to all matters relating to the winding up (see Section 145), if it thinks it expedient, direct meetings of the creditors or contributories to be summoned, held, and conducted in such manner as the Court directs, for the purpose of ascertaining their wishes. In the case of creditors regard is to be had to the value of the debt due to each creditor, and in the case of contributories to the number of votes conferred on each contributory by the Articles.

These meetings are, "subject and without prejudice to any express directions of the Court," governed by the Rules of 1909 (Rule 122), and are called "Court Meetings"; but Rules 133 to 137, dealing with proof of debts, valuation of security, and admission and rejection of proofs, do not apply (see Rule 133).

Section 219 applies at any time after the presentation of a petition to wind up the company, and the Court may direct meetings to be held to ascertain whether the majority of the creditors or contributories desire a winding up by the Court,² and give directions as to the time, place, and manner of holding such meetings; but it is not now common to order meetings, as the wishes of those who take a strong view are usually ascertained by their being represented in Court. The Court is not bound to comply with the wishes of the majority, and on good cause shown will set them aside,³ but this will usually only be in cases where fraud or misconduct is alleged against those holding the balance.

If a company is insolvent the contributories have no interest, and small regard is had to their wishes.⁴ On the other hand, if a majority of creditors desire a winding up by the Court the existence of a voluntary liquidation will not prevent the order being made, even where there is no evidence to show that the creditors are prejudiced.⁵

¹ *Re Radford and Bright*, [1901] 1 Ch. 272.

² *Western of Canada Oil Co.*, [1874] 17 Eq. 1.

³ *Contributories* *West Surrey Tanning Co.*, [1866] 2 Eq. 737; *Varieties, Limited*, [1893] 2 Ch. 235. *Creditors* *Medical Battery Co.*, [1894] 1 Ch. 448. *Debenture holders*: *Western of Canada Oil Co.*, [1874] 17 Eq. 1.

⁴ *Isle of Wight Ferry Co.*, [1864] 2 H. & M. 597; *Lonsdale Vale Ironstone Co.*, [1888] 18 W. R. 601.

⁵ *Bishop & Sons*, [1900] 2 Ch. 254; *Hermann Lechenstein & Co.*, [1907] 23 Times L. R. 424.

If there is a vacancy in the office of liquidator meetings must be called to consider the appointment of a new liquidator (Rules 58 [3] and 162). In any other case the liquidator may summon meetings when he thinks fit (Rule 121) by notices, which must be sent "not less than seven days¹ before the day appointed for the meeting," to the addresses given by creditors in their proofs, or if they have not proved to the addresses given in the statement of affairs or entered in the company's books as the addresses of the contributories, or if in either case there shall be no such address "to such other address as may be known to the person summoning the meeting" (Rule 123).

If any person other than the Official Receiver or liquidator requests that a meeting of creditors or contributories shall be held he must in the first instance deposit the amount of the costs, which will be repaid him if the Court so order or the creditors or contributories (as the case may be) by resolution so direct (Rule 126).

The majority to carry a resolution must be a majority "in number and value"² of those present personally or by proxy and voting; but in the case of contributories "value" is determined by the number of votes conferred on each contributory by the regulations (*i.e.* Articles of Association) of the company (Rule 128).

The non-receipt by any creditors or contributories of the notice will not invalidate the proceedings or resolutions unless the Court otherwise orders (Rule 130), but it may be assumed that if any substantial omission occurred the Court would order a fresh meeting.

By Rule 132 three creditors entitled to vote (*i.e.* who have proved their debts) or three contributories (if there are so many) form a quorum. If there are less than three creditors or contributories all must attend to constitute a quorum.

Proxies may be used and must be lodged with the Official Receiver or liquidator not later than four o'clock p.m. on the day before the meeting or adjourned meeting (Rule 147 [2]). Minors may not be appointed proxies (Rule 147 [3]). If the Official Receiver is nominated as proxy he may send a deputy to use the proxies (Rule 148). If a creditor is incapable of writing he may sign or make his mark in the presence of a witness, who must fill up the proxy and certify that the insertions were made at the request of the creditor and in his presence (Rule 149).

¹ *Seem* this means "clear days."

² If the majority in value differs from the majority in number there is no resolution, but the Court incline to the view of the majority in value (*Bloxwich Iron and Steel Co.*, [1891] W. N. 111).

The above Rules as to General Meetings and Proxies originally applied only in the case of compulsory liquidations, but by the Companies (Winding-up) Rules, 1921, Rules 123 to 132, 134, and 138 to 149, together with a new Rule numbered 149A, are made applicable to the creditors' meeting called under Section 188 in a voluntary winding up to consider the appointment of a liquidator.

THE LIQUIDATOR.

Appointment of Liquidator.

By Section 149, Sub-section 1, the Court is empowered to appoint a liquidator or liquidators, and by Sub-section 2 may at any time after the presentation of the petition appoint a provisional liquidator (see page 490); but in England immediately a winding-up order has been made the Official Receiver¹ becomes the provisional liquidator of the company until the appointment of some other person as liquidator. The Official Receiver is in England also *ex officio* provisional liquidator if any vacancy occurs in the office of liquidator, and the Court has no power to appoint any other person provisional liquidator after a winding up has been commenced,² nor can it appoint any other person to be permanent liquidator until an application has been made under Section 152,³ i.e. after the wishes of the creditors and contributories have been ascertained.

The Official Receiver, when liquidator or provisional liquidator in England, may obtain the appointment of a special manager with the powers of a receiver and manager (Section 161, and Rules 48 and 49).

In England the Court makes the appointment of the liquidator, after considering the report of the first meetings of creditors and contributories, either retaining the Official Receiver or appointing an unofficial person, and if the meetings differ decides between them, leaning towards the decision of that body which has the greater interest in the matter: i.e. if the assets are sufficient to pay the debts in full the contributories are most concerned, while if the assets are deficient the creditors alone are concerned.⁴

If the meetings of the creditors and contributories come to similar resolutions the Court may, on the application of the Official Receiver, at once act upon them, and it would seem has

¹ In the High Court a special officer is appointed as Official Receiver for the purpose of companies winding up. In the County Courts the Official Receivers in Bankruptcy act.

² *Re North Wales Gunpowder Co.*, [1892] 2 Q. B. 220. Before the winding-up order "the Official Receiver or any other fit person" may be appointed provisional liquidator (Section 149, Sub-section 3).

³ *Re John Reid & Sons*, [1900] 2 Q. B. 634.

⁴ *Bank of South Australia No. 2*, [1895] 2 Mans. 148.

no power to appoint any other liquidator than the person chosen by the meetings (Section 152), but it may make no order, in which case the Official Receiver remains liquidator.¹ When the meetings differ the Court fixes a day for hearing and decides between conflicting resolutions (Rule 55 [2]). The date fixed is advertised, and any contributory or creditor may attend and be heard (Rule 55 [3] and [4]). Usually the Court appoints the person selected at the meetings to be liquidator, but it is not compelled to do so, and sometimes refuses.¹ As a rule it leans in favour of appointing the Official Receiver.² A vacancy in the office of liquidator is filled in the same manner as the original appointment (Rule 55 [7]), the Official Receiver being required to summon meetings on the request of one tenth in value of the creditors or contributories.

A liquidator (other than the Official Receiver) in a winding up by the Court must, at his own expense, give security to the satisfaction of the Board of Trade before acting. In case of failure the appointment is vacated (Rules 57 and 58). In Scotland or Ireland the Court determines whether any and what security is to be given (Section 149, Sub-section 5).³

Where there is an action by debenture holders or mortgagees asking for a receiver, the Court will appoint the liquidator to be receiver,⁴ unless the assets are likely to be entirely absorbed in satisfying the debenture holders or mortgagees,⁵ or there are special reasons why the receiver nominated by the debenture holders should be entrusted with the duty of realising some or all of the assets.⁶

One or more liquidators may be appointed, and the Court may declare whether any act of the liquidators is to be done by all or any one or more of the persons appointed (Section 149, Sub-section 4). It is not now usual to appoint more than one liquidator. If various interests ought to be represented, that is secured in England by means of the committee of inspection.

In Scotland and Ireland the proper style of a liquidator appointed in a compulsory winding up is "the official liquidator of the A B Company," but in England merely "the liquidator," and he is not described by his individual name (Section 149, Sub-section 9).

¹ *Re Johannesburg Land Co.*, [1892] 1 Ch. 583.

² *Bloxwich Iron and Steel Co.*, [1894] 8 Rep. 412, 1 Mans. 350.

⁴ The surety is liable for any default in the performance of the liquidator's duty, but not for pecuniary interest payable by him for improperly retaining money (*Board of Trade v. Employers' Liability Corporation*, [1910] W. N. 101: Bankruptcy case).

⁵ *Re Joshua Stubbs, Limited*, [1891] 1 Ch. 475.

³ *Strong v. Carlyle Press*, [1893] 1 Ch. 268.

⁶ *British Lanen Co. v. South American Co.*, [1894] 1 Ch. 108.

Status of Liquidator.

As in the case of directors, it is not easy to state succinctly yet accurately the position occupied by a liquidator. In several cases there will be found statements to the effect that he is a trustee for the creditors, or in the case of a solvent company for the contributories. Thus, Lord Selborne says, "The hand which receives the calls necessarily receives them as a statutory trustee for the equal and rateable payment of all the creditors"¹; and James, L. J., speaks of the assets as being "fixed by the Act of Parliament with a trust for equal distribution among the creditors"²; and Lord Cairns has said, "There is . . . imposed upon the assets of the company . . . a trust to be applied in discharge of the liabilities of the company."³ But it must not be inferred that all the results follow which would ensue if the liquidator were a trustee in the full sense of the word; and in particular it is to be noted that the property in the assets remains vested in the company and does not pass to the liquidator,⁴ and when he makes a contract he does so in the name of the company: e.g. if he employs a solicitor in the company's business he is not personally liable for the costs.⁵ A liquidator "is a person having a *prima facie* right to costs (out of the estate), but he is not in the ordinary sense a trustee. He is a person appointed by the Court to do a certain class of things. He has some of the rights and some of the liabilities of a trustee, but is not in the position of an ordinary trustee. Being an agent employed to do business for a remuneration, he is bound to bring ordinary skill to its performance."⁶ Romer, J., has said, "In my opinion the liquidator is not a trustee in the strict sense. . . . In my view a voluntary liquidator is more rightly described as the agent of the company an agent who has no doubt cast upon him by Statute or otherwise special duties, amongst which may be mentioned the duty of applying the company's assets in paying creditors and distributing the surplus among the shareholders,"⁷ and in the case cited it was held that a liquidator was not liable for damages caused by delay in distributing the assets when the delay was not wilful or fraudulent nor arising from *mala fides*.

¹ Black & Co.'s Case, [1873] 8 Ch. 202.

² *Re Oriental Inland Steam Co.*, [1874] 9 Ch. 550.

³ *Dellin Bank's Case*, [1871] 15 Sol. J. 923; so also North, J., in *Flack's Case*, [1894] 1 Ch. 369; and Buckley, J., in *Anglo-Oriental Carpet Co.*, [1903] 1 Ch. 914.

⁴ See next note. In the case of an unregistered company the Court may make an order vesting the property in the liquidator (Section 272).

⁵ *Re Anglo-Moravian Co.*, *ex parte Watkin*, [1876] 1 Ch. D. 130, 133.

⁶ *Per Cotton, L. J.*, *Silver Valley Mines*, [1882] 21 Ch. D. at page 392.

⁷ *Knowles v. Scott* [1891] 1 Ch. 721 and 723.

It is submitted that that case overlooked the fact that a person injured by a failure to perform duties imposed by Statute may recover damages for the default, and on this principle it has been held that after a company has been dissolved a liquidator who has failed to see that the assets are applied in paying the debts is liable to a creditor who has suffered damage,¹ and it is submitted that the same rule should apply even before dissolution when the default is the result of neglect of duty, even though not wilful.²

It is clear that the liquidator occupies a fiduciary position, and must not make a secret profit out of his position,³ and it may be safely asserted that the liquidator has all the duties an agent would have; but it is suggested that he is only agent for the company, and therefore not liable to third parties, even though they be creditors or contributories, for negligence apart from misfeasance or personal misconduct.⁴ If, however, the liquidator "has misapplied or retained or become liable or accountable for any moneys or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company," he can be brought to account by any creditor or contributory on a summons under Section 215, but this will not enable a contributory who has accidentally been omitted in a distribution of assets to proceed by summons against the liquidator to obtain his due proportion of the assets.⁵

The liquidator represents creditors and contributories alike, and should bear an even hand between them. He should afford reasonable assistance and facilities to persons seeking information to enforce their rights⁶; but in cases of litigation he usually requires parties desiring access to the books and documents of the company to obtain an order for inspection under Section 221.

The liquidator, being an officer of the Court, will be directed to deal fairly: *e.g.* he may be ordered to repay moneys paid under a mistake of law.⁷ Instances of this rule may also be found in cases under the Bankruptcy Acts.⁸

¹ *Pulsford v. Devenish*, [1903] 2 Ch. 625, *Argyll's, Limited, v. Coxeter*, [1913] 29 T. L. R. 355.

² Compare *Woods v. Wmskill*, [1913] 2 Ch. 303, where a receiver was held personally liable for omitting to pay persons having a statutory right to payment under Section 209 of the Act.

³ *Silkstone and Hagh Moor Coal Co. v. Edey*, [1900] 1 Ch. 167.

⁴ *Knowles v. Scott*, [1891] 1 Ch. 723.

⁵ *Re Hill's Waterfall Estate and Gold Mining Co.*, [1896] 1 Ch. 947.

⁶ *Re Sir John Moore Gold Mining Co.*, [1879] 12 Ch. D. 328.

⁷ *Opera, Limited*, [1891] 3 Ch. 260; *ex parte Summonds*, [1886] 16 Q. B. D. 308.

⁸ See, for instance, *re Tyler*, [1907] 1 K. B. 865; *re Hall*, [1907] 1 K. B. 875.

A liquidator in a voluntary winding up is an officer of the company bound to see to the stamping of documents.¹

When a liquidator contracts he does so as agent of the company, but if in ordering goods or making a sale note he signs himself merely "A. B., Liquidator," it is not clear that he may not be personally liable, as a broker may be who signs "A. B., Broker."² He should therefore always sign with the words "On behalf of the Company."³ The words "as Liquidator" will protect him from personal liability if they form part of the signature, but not if only found in the body of the document.⁴ The provisions of The Bills of Exchange Act, 1882 (Section 26, Sub-section 1), must also be borne in mind: "Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature indicating that he signs for or on behalf of a principal or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent or as filling a representative character does not exempt him from personal liability."

Duties and Powers of Liquidator.

The first duty of the liquidator is, under Section 150, Sub-section 1, to take into his custody or under his control all the property, effects, and things in action to which the company is or appears to be entitled, and by Rule 161 the Official Receiver is in England directed to put the liquidator into possession of all the property of the company of which the Official Receiver may have custody, with a right, however, for the Official Receiver to be paid all fees, costs, and charges properly incurred or advances made (with interest on such advances at four per centum per annum), to secure which the Official Receiver has a lien on the company's assets. While there is no liquidator in England the Official Receiver takes possession; in Scotland and Ireland the property is deemed to be in the custody of the Court (Section 150, Sub-section 2).

The powers of the liquidator, as defined in Section 151, are set out below. In Scotland or Ireland he requires the sanction of the Court to the exercise of all these powers, but the Court may give him leave to act without the intervention of the Court in any matter except the appointment of a solicitor or law agent (Sub-section 4). In Scotland the liquidator has also the same

¹ *Re X Company*, [1907] 2 Ch. 92.

² *Hutcheson v. Eaton*, [1884] 13 Q. B. D. 861.

³ *Gadd v. Houghton*, [1876] L. R. 1 Ex. D. 357.

⁴ *Paice v. Walker*, [1870] L. R. 5 Ex. 173.

powers as the trustee of a bankrupt estate (Sub-section 6). In England the liquidator may exercise the powers mentioned under the first three headings only with the sanction of the Court or the committee of inspection; as regards the remaining powers he may act on his own initiative, but is subject to the control of the Court, and any creditor or contributory may apply to the Court as to the exercise of any of the powers (Section 151, Sub-sections 1 to 3).

The liquidator's powers are—

(A) In England with the sanction of the Court or the committee of inspection,¹ and in Scotland or Ireland with the sanction of the Court—

1. To bring or defend actions or other legal proceedings in the name of the company.
2. To carry on the business of the company so far as may be necessary for the beneficial winding up thereof.
3. To employ a solicitor or law agent, or in England any other agent, but in England only to take any proceedings or do any business which the liquidator is unable to do himself.²

(B) In England without any sanction, and in Scotland or Ireland with the sanction of the Court—

4. To sell the property and assets of the company by public auction or private contract, with power to transfer the whole or sell in parcels.
5. To execute deeds, receipts, and documents, and use the company's seal.
6. To prove, rank, and claim in the bankruptcy, insolvency, or sequestration of any contributory, and receive dividends.
7. To draw, make, and endorse any bill of exchange or promissory note in the name and on behalf of the company.

¹ Where a liquidator knowing that the committee of inspection disapproved of the appointment of a particular solicitor applied *ex parte* to the Court and obtained his appointment, Neville, J., on an application by the committee, discharged the order and directed the liquidator to pay the costs (*re Consolidated Diesel Engine Co.*, [1915] 1 Ch. 192). But the Court has jurisdiction to overrule the committee (*North Eastern Insurance Co.*, [1916] 85 L. J. (Ch. 751)).

² See last preceding note. In England the sanction must be obtained before the employment, except in cases of urgency, and even then it must be shown that there has been no undue delay in obtaining the sanction (see *London Metallurgical Co.*, [1897] 2 Ch. 262).

8. To raise any requisite money on the security of the assets of the company.
9. To take out in his official name letters of administration to any deceased contributory.
10. To do all such other things as may be necessary for winding up the affairs of the company and distributing its assets.

Under Section 95 of the Act of 1862 it was held that business must not be carried on with a view to rendering the shares more valuable,¹ and, under a similar section of The Bankruptcy Act, 1883, that it must not be with a view to profit²; but there are cases where the business has been carried on for years by a liquidator.

The matters following are repeated from the Winding-up Act of 1890, and apply only in England.

Section 173 provides that Rules may be made adding to the powers of the liquidator in regard to calling meetings of creditors and contributories, settling the list of contributories, and rectifying the Register, requiring the delivery up of property, and making calls, and fixing a time within which debts and claims must be proved; and the Rules give the liquidator in England the following powers, which formerly were exercisable by the Court only:—

1. To settle the list of contributories (Rules 77 to 82), but not to rectify the Register without the special leave of the Court.
2. To collect and distribute the assets of the company and to require delivery to him of its property, acting for these purposes as if he were a receiver appointed by the Court (Rules 75 and 76).
3. With the sanction of the Court or of the committee of inspection to make calls upon the contributories (Rules 83 to 87).

The Rules provide for the admission and rejection by the liquidator of proofs lodged by creditors (Rules 102 to 114). Rule 102 enables him to fix a day on or before which creditors are to prove their debts or to be excluded from the benefit of any distribution made before such debts are proved.

Moneys received by the liquidator in the course of the winding up must be paid into the Bank of England.³

¹ *Wreck Recovery Co.*, [1880] 15 Ch. D. 353.

² *Ex parte Emmanuel*, [1881] 17 Ch. D. 35.

³ See "Accounts of Liquidator," page 512, *infra*.

The liquidator is bound, if the liquidation lasts more than a year, to send to the Registrar of Companies from time to time a statement with respect to the proceedings and the position of the liquidation, and to this the creditors and contributories of the company have access, and may obtain copies thereof or extracts therefrom (Section 224).¹

During the liquidation the liquidator must, at least twice a year (or as much oftener as the Rules require), send to the Board of Trade an account of his receipts and payments, and this account, when audited, is to be printed and sent to each creditor and contributory (Section 155, and Rules 170 to 173: see also page 513, *infra*).

If the liquidator requires information as to the property of the company, or any alleged wrongful acts done in relation to its property or rights, he should apply to the Court for an examination of the persons concerned, under Section 174 (see page 583, *infra*).

The liquidator is the proper person to take proceedings under Section 215 against directors or officers for misfeasance, although creditors or contributories may take action if the liquidator fails to do so.

The liquidator must keep proper books of account, and minute books recording the proceedings of meetings, and these are to be open to creditors and contributories (Section 156; and see Rules 166 and 167).

A file of the proceedings in the winding up must also be kept, which shall be open to the inspection of the officers of the company and of the creditors and contributories (see Rules 16, 17, and 19).

The liquidator, within the limits of the Acts, may use his discretion, but he must obey any directions given him by meetings of the creditors or contributories, giving preference to the former if the directions are inconsistent (Section 158, Sub-section 1). He also has power to call meetings at his discretion, but must call them when required to do so by one tenth in value of the creditors or contributories, as the case may be (Section 158, Sub-section 2), and these meetings are governed by Rules 122 *et seq.* He can allow proceedings to be taken in his name by other persons, but he should not do so without satisfying himself of the propriety of such proceedings.²

The liquidator may himself apply at any time to the Court for directions, and any person aggrieved by any act or decision of the liquidator may apply to the Court to reverse or modify it (Section 158, Sub-sections 3 and 5).

¹ See "Accounts of Liquidator," page 512, *infra*.

² Practice Note, [1894] W. N. 156, 166.

Accounts of Liquidator.

Whether in a compulsory or a voluntary winding up, or a winding up under supervision,¹ the accounts of the liquidator must be made up and delivered in accordance with Section 224. By this section and Rule 189, if the winding up is not concluded² within a year, the liquidator must twice in every year send to the Registrar of Companies a statement of account with respect to the proceedings in and the position of the liquidation (the first statement being made within thirty days after the termination of the first year). Every statement must be in duplicate in the form given in the Rules (Form 92), and be verified by affidavit (Form 93), or if he have neither received nor paid any moneys during the period he must send an affidavit to that effect (Form 93). The statements made in this manner are open to the inspection of creditors and contributories of the company on payment of a fee.

If it appear that the liquidator has any moneys representing assets of the company which have been unclaimed or undistributed for six months after the date of receipt, he must pay them into the Bank of England to the Companies Liquidation Account,³ after which any person claiming any part of these moneys must obtain a certificate of his title from the liquidator, and apply to the Board of Trade for payment. When a liquidator makes default the Board of Trade does not fail to apply to the Court to enforce compliance under Section 224 and Rule 194, and will obtain from the Court an order for payment, and on further default a committal.

Every liquidator of a company being wound up by the Court must pay the moneys received by him into the Companies Liquidation Account at the Bank of England, unless the committee of inspection shall satisfy the Board of Trade that it is to the advantage of the creditors or contributories that the liquidator should have an account with any other bank. If the liquidator, without special authority from the Board of Trade, retains more than fifty pounds for upwards of ten days, he is liable to pay

¹ Stock and Share Auction Co. and Spiral Wood Co., [1894] 1 Ch. 736; and see Rule 194.

² This means if the company is not dissolved either by order of Court or by the lapse of three months from the final meeting in a voluntary winding up. In the latter case, however, the liquidation will not be deemed concluded if any assets remain unclaimed or undistributed in the liquidator's hands, but will be deemed to be concluded when he distributes them or pays them into the Companies Liquidation Account at the Bank of England (Rule 188).

³ Section 224, Sub-section 4, and Rule 191. Where money to which a shareholder was entitled but who could not be found was paid in under this section it was held that such money could not be made the subject of attachment under a garnishee order (Spence v. Coleman, [1901] 2 K. B. 199).

interest at twenty per centum per annum on the excess, to be disallowed all or part of his remuneration, and to be removed from office, as well as to pay any expenses occasioned by his default. All payments out of any special account must be made by cheque payable to order, having on the face of it the name of the company, signed by the liquidator and at least one member of the committee of inspection, or such other person as the committee may appoint.

Moneys in the hands of the liquidator on account of unclaimed dividends must, on the expiration of six months from the declaration of the dividend, be paid into the Companies Liquidation Account. Other moneys representing unclaimed or undistributed assets which have been for six months in the liquidator's hands, less so much as the Board of Trade may authorise the liquidator to retain for immediate use, must be paid into the same account within fourteen days from the date to which the statement of account is brought down (Rule 191 and Section 224). For the purpose of paying in the liquidator must get a paying-in order from the Board of Trade. Every liquidator must furnish particulars of moneys in his hands to the Board of Trade, who may require the same to be verified by affidavit (Rules 192 and 193).

Investment of Funds.

Where the committee of inspection think that any cash balance should be invested, or that any investments should be sold, they must sign, and the liquidator must transmit to the Board of Trade, a request to that effect (Rule 168). If there is no committee of inspection the liquidator sends a certificate and request to the Board of Trade, who may then make the proper order (Rule 168 [3]).

Audit of Accounts of Liquidator.

The committee of inspection must once every three months audit the liquidator's cash book (Rule 169), and every six months the liquidator must send to the Board of Trade a copy of his cash book in duplicate, with vouchers and the committee's certificate of audit, and a report on the position of the liquidation, and with the first accounts send a summary of the company's statement of affairs, showing thereon in red ink the amounts realised and the reason for non-realisation of any other assets. The accounts must be verified by affidavit (Rule 170).

Where the business is carried on, a separate trading account, verified by affidavit, must be submitted by the liquidator once a month to the committee of inspection, or a member of the committee appointed for the purpose, who must examine and certify the same (Rule 171).

Besides the accounts the liquidator must submit to the Board of Trade a summary of such accounts, which when approved by the Board of Trade is printed and sent to the creditors and contributories (Rule 173). The accounts when audited are filed with the Registrar (Rule 172).

Books to be Kept by Liquidator.

The liquidator must keep a Record Book, in which he must enter all minutes, all proceedings had and resolutions passed at any meeting of creditors or contributories or of the committee of inspection, and all such matters as may be necessary to give a correct view of his administration; but he is not bound to insert therein documents of a confidential nature, such as opinions of counsel (Rule 166).

He must also keep a Cash Book, and enter therein from day to day the receipts and payments made by him, and submit the Record Book and Cash Book to the committee of inspection whenever required, and not less often than once every three months (Rule 167).

Remuneration of Liquidator.

The liquidator, as occupying a fiduciary relation, must not make any secret profit out of his office.¹ Equally it would be wrong for him to have any personal interest in dealing with the company's assets, even if taken openly. In England, Rule 156 expressly states that "neither the liquidator nor any member of the committee of inspection of a company shall, while acting as liquidator or member of such committee, except by leave of the Court, either directly or indirectly, by himself or any partner, clerk, agent, or servant, become purchaser of any part of the company's assets." Any purchase made in violation of this Rule may be set aside. In like manner, by Rule 157, if he carries on the business of the company he cannot purchase goods from any person whose connection with him is such that he would derive any profit from the transaction.

Rule 155 expressly forbids the liquidator accepting any share of costs or fees or other benefits from any solicitor, auctioneer, or other person connected with the company or the winding up, or giving any share of his remuneration to any such person.

By Section 149, Sub-section 8, where a person other than the Official Receiver is appointed liquidator he shall receive such salary or remuneration, by way of percentage or otherwise, as the

¹ *Devonshire Silkstone Coal Co.*, [1878] W. N. 71; *Silkstone and Haigh Moor Coal Co. v. Edey*, [1900] 1 Ch. 167.

Court may direct, and if there are two or more liquidators the Court will direct in what proportions the remuneration is divisible. This provision governs the remuneration of liquidators in Scotland and Ireland, but in England the matter is further controlled by the Rules. Rule 154 declares that the liquidator's remuneration shall, unless the Court otherwise order, be fixed by the committee of inspection, and be in the nature of a commission or percentage, of which one part shall be payable on the amount realised after deducting the sums (if any) paid to secured creditors (other than debenture holders), and the other part on the amount distributed in dividend. The Board of Trade may, if of opinion that the remuneration so fixed is too large, apply to the Court, who shall thereupon fix the remuneration (Rule 154 [2]); but no power is given to the liquidator to appeal to the Court if dissatisfied. If there is no committee of inspection the remuneration of the liquidator is (unless the Court otherwise order) fixed by the scale of fees and percentages allowed to the Official Receiver (Rule 154 [3]).

It would seem that the committee of inspection cannot vote a lump sum to the liquidator, but must proceed by way of voting a percentage on the amount actually realised by the liquidator.¹ If after much labour it appears the proceeds will be very small (*e.g.* when expensive litigation has taken place and has absorbed the bulk of the assets) it may become advisable for the liquidator to apply to the Court to fix his remuneration in place of leaving it to the committee, and a similar course may become prudent if some members of the committee have shown marked hostility to the liquidator. The Court has power to order that the remuneration shall not be fixed by the committee.

The liquidator is frequently also appointed to be receiver for the debenture holders, in which case he may obtain also remuneration as such receiver, but this fact will of course be taken into account in fixing his remuneration as liquidator.

When the Official Receiver is liquidator the fees payable for his services are in accordance with the scale prescribed by the order of the Lord Chancellor.

Resignation or Removal of Liquidator.

A liquidator appointed by the Court may resign, or, "on cause shown," may be removed by the Court (Section 149, Sub-section 6). According to the Rules in England, if a liquidator desires to resign he must summon meetings of the creditors and contributories. If both meetings agree to accept his

resignation the liquidator must file with the Registrar and send to the Official Receiver notice of his resignation, which thereupon takes effect. In any other case the liquidator must report to the Court and the Official Receiver the result of the meetings, and the Court will then determine whether the resignation is to be accepted, and give the proper directions (Rule 162). If a receiving order in bankruptcy is made against a liquidator he vacates his office, and is to be deemed to have been removed (Rule 163). If a liquidator retains more than fifty pounds for more than ten days he may be removed from office by the Board of Trade (Section 154, Sub-section 2). When a liquidator obtains an order of release, this operates as a removal from office (Section 157, Sub-section 4). If a liquidator fails to give the required security the Official Receiver reports the fact to the Court, who may thereupon rescind the order appointing him; and if he fails to keep up his security the Court may upon a like report remove him (Rule 58). If any vacancy occurs in the office of liquidator in England the Official Receiver becomes, by virtue of his office, liquidator during the vacancy (Section 149, Sub-section 7).

In case of the death, removal, or resignation of a liquidator, another may be appointed in his place in the same manner as directed in the case of a first appointment, and in England the Official Receiver must, on the request of not less than one tenth in value of the creditors or contributories, summon meetings for the purpose of determining whether or not the vacancy shall be filled (Rule 55 [7] and Rule 58 [3]). In Scotland or Ireland the Court appoints the person to fill the vacancy.

Except in the case of a liquidator failing to give or keep up his security, due cause must be shown for his removal. The Court accordingly requires a case of unfitness of the person, or of misconduct, to be made out before removing a liquidator¹: *e.g.* that he has made a profit beyond his proper remuneration,² or that it be shown that, although there is no personal unfitness of the liquidator, his removal is for the interests of the liquidation.³ The Court has removed a liquidator where the conduct of directors required investigation and the liquidator's relationship with them was so intimate that he was not in a position to act independently,⁴ or where a liquidator persisted in proceedings against the wishes of the majority of the creditors,⁵ or continued proceedings at the

¹ *Sir John Moore Gold Mining Co.*, [1879] 12 Ch. D. 325, where the liquidator put obstacles in the way of proceedings against the directors. Compare *ex parte Newitt*, [1885] 14 Q. B. D. 177, under The Bankruptcy Act, 1883.

² *Devonshire Silkstone Coal Co.*, [1878] W. N. 71.

³ *Adam Eytton*, [1887] 36 Ch. D. 209.

⁴ *Charterland Goldfields*, [1909] 26 Times L. R. 132.

⁵ *Tavistock Iron Works Co.*, [1871] 19 W. R. 672, 24 L. T. 605.

wish of the contributories after it had appeared that only the creditors were interested,¹ and if a supervision order is made and the company is insolvent the Court may give effect to the wishes of the creditors² by removing the voluntary liquidator. Insanity³ or absence from the kingdom⁴ is a ground for removal. The Court sometimes will remove a liquidator on the ground that another person will act gratuitously,⁵ but may refuse.⁶ The liquidator must be served with notice of the application and may appeal, when the Court of Appeal will reconsider the grounds alleged,⁷ but will not override the discretion of the Judge if he has acted on correct principles.⁸

Release of Liquidator.

In England, when a liquidator of a company being wound up by the Court has (A) realised all the property of the company, or so much thereof as can, in his opinion, be realised without needlessly protracting the liquidation, and distributed a final dividend to the creditors, and adjusted the rights of the contributories among themselves, and has made a final return (if any) to the contributories, or (B) has resigned, or (C) has been removed from his office, the Board of Trade must, on his application, cause a report on his accounts to be prepared, and, after considering such report and the objections (if any) of any creditor or contributory or other person interested, either grant or withhold his release, subject, nevertheless, to an appeal to the High Court (Section 157).

If the release of the liquidator is withheld the Court may, on the application of any creditor, contributory, or person interested, make an order charging him with the consequences of any act or default done or made contrary to his duty (Sub-section 2).

If the release is granted, it discharges him from all liability in respect of any act or default in the administration of the affairs of the company or in relation to the conduct of the liquidation.⁹ The order of release may, however, be revoked on

¹ Rubber and Produce Investment Trust, [1915] 1 Ch. 382.

² Oxford Building and Investment Society, [1883] 49 L. T. 405.

³ North Molton Mining Co., [1886] 34 W. R. 527.

⁴ Scotch Granite Co., [1867] 17 L. T. 533.

⁵ Association of Land Financiers, [1879] 10 Ch. D. 260.

⁶ Civil Service and General Stores, [1884] W. N. 158.

⁷ Oxford Building and Investment Society, [1883] 49 L. T. 405; *See* John Moore Gold Mining Co., [1879] 12 Ch. D. 325, *Adam Eytton*, [1887] 36 Ch. D. 209.

⁸ *Ex parte Sheard*, [1881] 16 Ch. D. 107; *re Urnston Grange Steamship Co.*, [1900] 17 Times L. R. 553.

⁹ Where a trustee under a deed of arrangement was released, but had money in hand available to pay a dividend, he was ordered to pay notwithstanding the release (*re Prager*, [1876] 3 Ch. D. 115).

proof that it was obtained by fraud or suppression or concealment of any material fact (Sub-section 3).¹ If the liquidator has not previously vacated his office the release operates as a removal from office (Sub-section 4).

Before applying for his release the liquidator must give notice to all creditors who have proved, and to all contributories; and with the notice he must send a summary of his receipts and payments as liquidator (Rule 197).

COMMITTEE OF INSPECTION.

Before 1891 there was no power to appoint a committee of inspection analogous to the committee in bankruptcy, and in Scotland and Ireland there is still no such power. In England, however, by Section 152 it is provided that, upon an order to wind up being made, the Official Receiver must summon separate meetings of the creditors and contributories to determine whether an application shall be made to the Court for the appointment of such a committee, and who are to be the members. If desired, the Court may appoint the committee, and if an important creditor or class of creditors is unrepresented through no fault of his or their own, the Court may direct the liquidator to summon a meeting of creditors to consider whether some member of the committee should not be removed and a representative of the "aggrieved" creditor substituted,² or may order a fresh meeting to be summoned under Section 152.³ The committee must consist of creditors or contributories, or persons holding powers of attorney from them, in such proportions as may be agreed on by the meetings, or in case of difference as may be determined by the Court (Section 160, Sub-section 1).

The committee will meet at such times as are appointed, or in default of appointment at least once a month, and the liquidator or any member of the committee may call a meeting (Section 160, Sub-section 2). The creditors or contributories may remove members of the committee appointed by them, or members of the committee may resign (Sub-sections 3 and 6). They will be disqualified by bankruptcy, compounding with creditors, or absence from five consecutive meetings without leave of the committee, and upon a vacancy occurring the liquidator must call a meeting of creditors or contributories, as the case may be, to fill the vacancy; but during a vacancy the committee may continue to act so long as two members remain in office (Section 160, Sub-sections 3 to 8).

¹ The element of fraud, however, must be found in the concealment (*re Harris*, [1899] 2 Q. B. 97).

² *Radford and Bright*, [1901] 1 Ch. 272.

³ *Radford and Bright No. 2*, [1901] 1 Ch. 735.

The committee of inspection to some extent control the liquidator, and by means of their monthly or more frequent meetings are able to keep themselves informed of the progress of the liquidation. It has been seen (page 509, *supra*) that certain acts of the liquidator can only be done with the sanction of the committee.

If there is no committee of inspection the sanction of the Board of Trade is required for these last-mentioned acts (Section 160, Sub-section 9), and, by Rule 205, these functions of the Board of Trade may be exercised by the Official Receiver, except that in such a case no call can be made without the sanction of the Court (Rule 83 [5]).

The committee of inspection are precluded from making any profit directly or indirectly from any transaction arising out of the winding up, unless the sanction of the Court is obtained before the profit is made (Rule 158, and *re* Gallard, [1896] 1 Q. B. 68). Nor may they receive any payment for services rendered in connection with the administration of the assets or for goods supplied for or on account of the company without the like sanction (Rule 158), and they are forbidden directly or indirectly, by themselves, or any partner, clerk, agent, or servant, except by leave of the Court, to purchase any part of the company's assets; and any purchase made in contravention of this rule may be set aside on the application of the Board of Trade or any creditor or contributory (Rule 156).

The Court may allow a payment to members of the committee for services rendered, but the order must state the nature of the services, and will only be given where the services are of a special nature. Without the express sanction of the Court no remuneration may under any circumstances be paid (Rule 160).

"The committee may act by a majority of their members present at a meeting, but shall not act unless a majority of the committee are present" (Section 160, Sub-section 3): that is to say, a majority of the members is necessary to form a quorum.

Under Section 188, which requires the liquidator to summon a meeting of creditors immediately on his appointment, the appointment of a committee of inspection in a voluntary winding up may be obtained (see page 529, *infra*).

EFFECT OF A COMPULSORY WINDING UP.

Immediately upon the winding-up order becoming operative the control of the company's affairs passes out of the hands of the directors, and in England the Official Receiver immediately takes control. Upon the appointment of a liquidator the management becomes vested in the liquidator; but the company's corporate identity continues, and its property remains vested in the

corporation,¹ subject to any equities affecting the same.² The essential difference, however, is that the business is henceforth not carried on for the benefit of the members of the corporation, but with a view only to its winding up and the distribution of the assets among the creditors in satisfaction of their debts, and when these are satisfied for the division of the balance (if any) 'among the contributories. The assets are therefore held upon a trust in which the creditors are interested, and they can apply to the Court to have their rights enforced.³

Certain results follow by Statute from the making of the order. Thus, by Section 205, Sub-section 2, it is enacted—

In the case of a winding up by or subject to the supervision of the Court, every disposition of the property (including things in action) of the company, and every transfer of shares, or alteration in the status of its members, made after the commencement of the winding up,⁴ shall, unless the Court otherwise orders, be void.

As regards the position of shareholders, no transfer can be effected without registration of the transfer in the Register of Members of the company, and under Section 163, even as qualified by Section 173, the Register cannot be rectified without the leave of the Court⁵; but as between the vendor and purchaser of shares under a contract or transfer, equitable rights arise which are not affected by the section cited above, and the purchaser can claim through his vendor any dividends declared on the shares,⁶ and may, when calls are made (but not before), enforce his right to indemnity.⁷ But the Court may, by allowing a transfer to be registered, give full effect to the dealing, but usually refuses to enforce specific performance of a contract to sell.⁸ When a transfer is registered the effect is to make the transferor a past member (to be put on the "B" list of contributories) and the transferee a present member.⁹ It has been said that the Court will not sanction transfers except in special circumstances,⁵ but in a case where there were considerable

¹ *Ex parte Watkin*, [1876] 1 Ch. D. 130.

² *Gorringe v. Irwell India Rubber Works*, [1886] 31 Ch. D. 128, from which it appears that an equitable assignment of a debt, even though not completed by notice to the debtor, binds the liquidator.

³ See page 506, *supra*, where the question of how far the liquidator is a trustee for the creditors is considered.

⁴ The "commencement" in the case of a compulsory liquidation is the date of the presentation of the petition (Section 139), and in the case of a winding up under supervision the date of the resolution for voluntary liquidation (Section 183).

⁵ *Onward Building Society*, [1891] 2 Q. B. 463.

⁶ *Rudge v. Bowman*, [1868] L. R. 3 Q. B. 689; *Chapman v. Shepherd*, [1867] L. R. 2 C. P. 228.

⁷ *Hughes-Hallett v. Indian Mammoth Mines*, [1883] 22 Ch. D. 561.

⁸ *Emmerson's Case*, [1866] 1 Ch. 433.

⁹ *Taylor, Phillips and Rickard's Case*, [1897] 1 Ch. 298, a case arising in a voluntary liquidation.

dealings in shares of a company in liquidation, substantially all the transfers were sanctioned on the ground that this put the persons really interested in a position to enforce their rights.¹

As regards dispositions of property of the company made after the presentation of the petition, the Court leans strongly in favour of giving effect to transactions in the ordinary course of business *bonâ fide* completed before the winding-up order,² but does not assist those which remain only in contract.³ In the latter case the contracting party, even if he has parted with his money, can only prove for damages.²

Money paid or property transferred to the company during the period in question is not affected, and the payment is a good satisfaction of the debt,³ but if payment is made by the company the recipient will be compelled to refund and prove for his debt,⁴ although in the European Arbitration Lord Westbury confirmed payments made before the recipient had notice of the liquidation.⁵ Directors who make payments after presentation of the petition may also become personally liable to refund the amount.⁶

As the winding up determines the powers of the directors to act for the company, an acceptance of a bill of exchange in the company's name made after the presentation of the petition is invalid.⁷

The Bankruptcy Rules as to reputed ownership and goods in the order and disposition of the bankrupt are not imported into the winding up of companies.⁸

The winding-up order also has the effect of determining the operation of all Articles of Association which are inconsistent with the provisions of the parts of the Acts relating to winding up. Thus, Articles restricting the right of the company to make calls⁹ or giving or restricting rights of inspecting books¹⁰ cease to operate, the rights of the parties being those conferred

¹ Standard Exploration Co., [1901] *per* Wright, J. (unreported).

² Wiltshire Iron Co., [1868] 3 Ch. 413; *re* Oriental Bank Corporation, *ex parte* Guillemin [1885] 28 Ch. D. 634.

³ Mersey Steel and Iron Co. v. Naylor, Benzon & Co., [1884] 9 App. Ca. 431; Contract Corporation, [1868] 3 Ch. 105.

⁴ Brown and Tylden's Case, [1874] 18 Sol. J. 781; Liverpool Civil Service Association, [1874] 9 Ch. 511.

⁵ National Bank's Case (European Arbitration), L. T. 92.

⁶ North Harbour Co., [1887] W. N. 87, 50 L. T. 727; Civil Service and General Stores, [1888] 57 L. J. Ch. 119.

⁷ Bolognesi's Case, [1870] 5 Ch. 507.

⁸ See page 549, *infra*.

⁹ Newton v. Anglo-Australian Investment Co., [1895] App. Ca. 244.

¹⁰ Yorkshire Fibre Co., [1870] 9 Eq. 650; Birmingham Banking Co., [1867] 36 L. J. Ch. 150, 15 L. T. 207.

by the Acts. Similarly, an Article giving rights inconsistent with Section 192 in case of a reconstruction cannot be enforced after a winding up.¹

On the commencement of a winding up the Statute of Limitations ceases to run in the company's favour, and a solicitor's bill is liable to taxation unless a year from the date of its presentation has expired before the commencement of the winding-up (see page 552, *infra*).

A further effect of the winding up is to stay proceedings against the company—which is considered later (see page 544).

The liquidation does not bring the business of the company to an end, and dealings with strangers must proceed; nor does the liquidation of itself constitute a breach of unperformed contracts; nor can third parties refuse to perform their contracts with the company: if the liquidator carries out a contract on the company's behalf he can recover the consideration.² If, however, the liquidator has declared his inability to perform the company's contracts, the other contracting parties may treat this as an immediate breach of contract, and claim damages as in the case of an individual refusing or admitting inability to carry out his contracts.³ But where a company has two contracts with the same person the liquidator may adopt one and enforce its performance while not performing the other.⁴ In the case of servants, if a winding-up order is made and the business of the company ceases to be carried on,⁵ or if a receiver and manager is appointed on behalf of the debenture holders,⁶ this operates as a discharge of such servants, and if entitled to notice they may at once commence proceedings to recover damages, and a manager who, having a contract for a term of years, has in such contract covenanted not to trade in competition with the company is freed from his obligation by the breach of contract caused by the liquidation.⁷ Where a servant or agent has a right to commission upon the business done or profits earned by a company, the winding-up puts an end to his chance of earning commission, but whether this will give him a right to damages in respect of this loss will depend upon the terms of his contract. An agreement that he shall receive a

¹ *Payne v. Cork Co.*, [1900] 1 Ch. 308; *Baring-Gould v. Sharpington Pick Syndicate*, [1899] 2 Ch. 80.

² *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.*, [1884] 9 App. Ca. 434.

³ *Ogdens, Limited, v. Nelson*, [1905] App. Ca. 109.

⁴ *Asphaltic Limestone Concrete Co. v. Glasgow Corporation*, [1907] Court of Sess., S.C. 463.

⁵ *Chapman's Case*, [1806] 1 Eq. 340; *McDowall's Case*, [1886] 32 Ch. D. 306.

⁶ *Reid v. Explosives Co.*, [1897] 19 Q. B. D. 204.

⁷ *Measures Brothers v. Measures*, [1910] 2 Ch. 248.

commission upon the sales of the company for a period of years will give the agent no right to damages by reason of the company being wound up,¹ but an agreement containing a provision that the company shall accept and pay commission upon such orders as the agent shall introduce will give a right to damages for loss by reason of the company ceasing to carry on business,² for this amounts to an express agreement to continue the business.

If the liquidator or receiver is willing to retain the company's servants in his employ at wages equal to those they received from the company, there will be no damages, although there is a technical breach of contract.³ If, however, after the commencement of the liquidation the business is carried on without interruption, the employment continues, or must be taken to be renewed on the same terms, and a notice of discharge must be given in accordance with the terms of the employment.³ It has been held that the passing of a resolution for voluntary liquidation does not operate as a notice of discharge to the servants of the company where the business is continued.⁴

The appointment of a liquidator, whether in a voluntary or a compulsory winding up, determines the authority of agents of the company appointed by the directors as from the time when notice of the winding up or the appointment of a provisional liquidator reaches them.⁵

¹ *Ex parte Maclure*, [1870] 5 Ch. 737. *R. S. Newiman, Limited, Raphael's Claim*, [1916] 2 Ch. 309.

² *Reigate v. Union Manufacturing Co.*, [1918] 1 K. B. 502.

³ *Ex parte Harding*, [1868] 3 Eq. 341.

⁴ *Midland Counties District Bank v. Attwood*, [1905] 1 Ch. 357.

⁵ *Re Oriental Bank Corporation, ex parte Guillemin*, [1885] 28 Ch. D. at page 640.

CHAPTER II.

WINDING UP VOLUNTARILY.

A VOLUNTARY winding up is the act of the company, undertaken in pursuance of a resolution passed by the company whenever it either desires to put an end to its business or finds itself unable, by reason of its liabilities, to continue such business. The procedure leaves the control of the winding up to a considerable extent in the hands of the members, acting through a liquidator appointed by themselves, and was no doubt originally intended mainly for use by solvent companies; but it is not in any way limited by the Statutes to the case of companies able to pay their debts, although there is provision that if creditors are prejudiced by the continuance of the voluntary winding up they may petition for a compulsory order.¹

Section 182 provides that a company registered under the Acts² may be wound up voluntarily--

- (1) When the period (if any) fixed for the duration of the company by the Articles expires, or the event (if any) occurs on the occurrence of which the Articles provide that the company is to be dissolved, and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily.
- (2) If the company resolves by special resolution that the company be wound up voluntarily.
- (3) If the company resolves by extraordinary resolution to the effect that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up.

The first event is one that seldom happens; but sometimes a company's Articles of Association do prescribe a time when the duration of the company shall expire, and in that case it is the duty of the directors to call a general meeting for the purpose of passing a resolution that, the objects for which the company was formed having been accomplished, or the period having arrived for its termination, the company be wound up voluntarily.

¹ The great majority of liquidations take place voluntarily. In 1922 there were 2556 voluntary liquidations, 14 voluntary liquidations were continued under the supervision of the Court, and 264 compulsory orders were made.

² This will include a company registered under the earlier Joint Stock Companies Acts (London India Rubber Co., [1866] 1 Ch. 329; Beaujolais Wine Co., [1868] 3 Ch. 15), but not an unregistered company. The winding up of unregistered companies by the Court is expressly provided for by Section 203, but by Sub-section 1 (ii.) "no unregistered company shall be wound up under this Act voluntarily or subject to supervision."

The most frequent course is that provided for in Sub-section 2: namely, to pass and confirm a special resolution to wind up voluntarily.

The third method—namely, by passing an extraordinary resolution—can only be adopted where a company is insolvent, and in that case the resolution must expressly state that the company is to be wound up because it is unable, “by reason of its liabilities,” to continue its business. In fact, in this, as in other cases, the proper course is to follow the words of the Act in the resolution, and in the notice of meeting to set out the exact words of the resolution to be submitted.

The resolution will not be effective unless duly passed at a meeting of which a proper notice is given¹ by the direction of a properly constituted board of directors² and at which a quorum was present,³ and if the winding up is by special resolution the prescribed interval of fourteen days must have elapsed between the passing and confirmation of the resolution.⁴ The resolution must be in accordance with the notice or it will be invalid⁵; although it has been held that where a meeting was held without notice, but all the members attended, the members could waive the formalities as to notice and the winding-up resolution was valid.⁶ Irregularity in taking the votes (*e.g.* by reckoning proxies when no poll has been demanded) will equally render the resolution of no effect.⁷

The winding up commences at the time of “passing” the resolution to wind up (Section 183): that is to say, in the case of a special resolution when it is confirmed.⁸

On the passing of a resolution to wind up voluntarily Section 184 provides that the company shall cease to carry on its business, except so far as may be required for the beneficial winding up thereof; but the corporate state and corporate powers of the company continue until it is dissolved. On the appointment of the liquidator (which usually forms part of the resolution to wind up) the property of the company comes under his control for distribution among the creditors and shareholders.

¹ *Bridport Old Brewery Co.*, [1867] 2 Ch. 191; *Patent Floorcloth Co.*, [1869] 8 Eq. 604; *Tieszen v. Henderson*, [1899] 1 Ch. 861. Also see statement of facts in *Allison, Johnson & Foster, Limited*, [1904] 2 K. B. 327.

² *Harben v. Phillips*, [1883] 23 Ch. D. 14; *Haycraft Gold Reduction Co.*, [1900] 2 Ch. 230. Where the secretary summoned the meeting on receipt of a requisition without authority of the board or waiting twenty-one days it was held that the resolution for winding up was invalid (*re* *State of Wyoming Syndicate*, [1901] 2 Ch. 431).

³ *Cambrian Peat Co.*, [1874] 31 L. T. 773.

⁴ *Railway Sleepers Supply Co.*, [1885] 22 Ch. D. 204.

⁵ *Teede and Bishop*, [1901] 70 L. J. Ch. 409, 8 Mans. 217.

⁶ *Oxted Motor Co.*, [1921] 3 K. B. 32.

⁷ *Caratal (New) Mines*, [1902] 2 Ch. 408.

⁸ *Dawes's Case*, [1868] 6 Eq. 232; *Weston's Case*, [1869] 4 Ch. 20.

The resolution to wind up, whether it be "special" or "extraordinary," must be printed in the prescribed form, and a copy, authenticated by the signature of the chairman or other officer of the company, filed with the Registrar of Companies within fifteen days after its confirmation or passing (Section 70, Sub-section 1). The resolution must also be advertised in the *London Gazette* if the company was registered in England; in the *Edinburgh Gazette* if in Scotland; and in the *Belfast* or *Dublin Gazette* if in Northern or Southern Ireland respectively (Section 185). The *Gazette* officials, before accepting a copy of the resolution for advertisement, require that it shall be signed or authenticated by a solicitor.

An ordinary resolution under Sub-section 1 of Section 182 should be filed with the Registrar in order that there may be a record on the file that the company is in liquidation, and the resolution should be gazetted, but the Act does not require this. A notice of the appointment of the liquidator, however, is required by Section 187 to be filed within twenty-one days after the appointment.

EFFECT OF A VOLUNTARY WINDING UP.

The effect of a voluntary winding up is that from the date of the confirmation of the special resolution or passing of the extraordinary or ordinary resolution to wind up—

1. The company must cease to carry on its business, except in so far as may be required for the beneficial winding up thereof (Section 184).
2. A liquidator or liquidators must be appointed (Section 186, ii.).
3. On the appointment of liquidators the powers of the directors cease, except so far as the company in general meeting, or the liquidator, sanctions their continuance¹ (Section 186, iii.).
4. All transfers of shares, unless made to or with the sanction of the liquidator, and any alterations in the status of the members of the company made after that date, are void (Section 205, Sub-section 1).²
5. The property of the company must be applied in satisfaction of its liabilities in accordance with their respective priorities, if any, or, subject to any such priorities, *pari passu*. The balance remaining must, unless the Articles otherwise provide, be distributed amongst the members according to their rights and interests in the company (Section 186, i.).

¹ See *Ladd's Case*, [1893] 3 Ch. 450.

² The effect of transfers made after the commencement of the winding up without sanction will be the same as in the case of a winding up by the Court, as to which see page 520, *supra*.

But the corporate state and all the corporate powers of the company remain until, its affairs having been wound up, it is dissolved (Section 184). The effect of a winding up on contracts and engagements of the company has been considered at page 516, *supra*.

The company must not, on going into liquidation, give gratuities to directors or servants, and if they are voted the liquidator must refuse to pay them.¹

The commencement of a voluntary winding up does not prevent the presentation of a petition for the continuance of the liquidation subject to the supervision of the Court (Section 199), or for compulsory winding up of the company by the Court if the creditors or contributories are prejudiced by the voluntary liquidation (Section 197; and see also page 479, *supra*).

THE LIQUIDATOR.

Appointment and Removal of Liquidator.

The appointment of the liquidator is properly made by the company in general meeting, and he may be appointed by special or ordinary resolution at the meeting at which the resolution to wind up is passed, or by a wholly distinct resolution. It is not necessary to give notice of the intention to appoint a liquidator if made by ordinary resolution.² If the resolution to wind up is special, the appointment of the liquidator cannot be made until after its confirmation, but it may be by a resolution passed before and confirmed after the confirmation of the winding-up resolution.³ Even if a resolution to appoint a liquidator is joined with the special resolution to wind up, but is not confirmed at the second meeting, another liquidator may be proposed and appointed at the same meeting without notice.⁴ The company may, by extraordinary resolution, delegate the power to appoint liquidators to its creditors or any committee of them, or enter into any arrangement as to the exercise of the liquidator's powers (Section 190), this being in addition to the power of the creditors to apply to the Court under Section 188 where a voluntary liquidator has been appointed. Where there is no liquidator the Court may appoint one, or may, "on cause shown," remove a liquidator (as to what is "cause shown" see page 516, *supra*) and appoint another in his place (Section 186, viii. and ix.).

¹ *Hutton v. West Cork Railway*, [1883] 23 Ch. D. 654; *Strond v. Royal Aquarium Co.*, [1903] 89 L. T. 243.

² *Oakes v. Turquand*, [1867] L. R. 2 H. L. 355; *re Welsh Flannel Co.*, [1875] 20 Eq. 360; *Indian Zoedone Co.*, [1884] 26 Ch. D. 70.

³ *Indian Zoedone Co.*, [1884] 26 Ch. D. 70; *London and Australian Agency Corporation*, [1873] W. N. 198, 29 L. T. 417.

⁴ *Bethell v. Trench Tubeless Tyre Co.*, [1900] 1 Ch. 408.

It seems the Court may also, "on cause shown," appoint an additional liquidator,¹ or it may appoint a liquidator in the place of one retiring.²

The liquidator is required, within twenty-one days after his appointment, under a penalty not exceeding five pounds a day, to file with the Registrar a notice of his appointment in the prescribed form (Section 187).

There having been much objection taken that voluntary liquidations were sometimes run through by a liquidator nominated by the directors without regard to the wishes or rights of the creditors, Section 188 has established a new procedure, giving the creditors greatly extended powers in regard to the appointment of the liquidator in a voluntary winding up. By this section every liquidator appointed by a company in a voluntary winding up must, within seven days after his appointment, "send notice by post to all persons who appear to him to be creditors of the company,"³ convening a meeting of creditors for a day not less than fourteen nor more than twenty-one days after his appointment, and specifying the place and hour, and must advertise notice of the meeting once in the *Gazette* and once at least in two local newspapers circulating in the district where the registered office or principal place of business of the company was situate (Sub-section 1).

At this meeting the creditors are to determine whether an application shall be made to the Court for the appointment of any person in place of or jointly with the liquidator appointed by the company, or for the appointment of a committee of inspection, and, if the creditors so resolve, an application may be made accordingly to the Court at any time not later than fourteen days after the date of the meeting by any creditor appointed for the purpose at the meeting (Sub-section 2). The creditors should go to the meeting prepared with the name of some person willing to take the necessary proceedings, for only the person appointed at the meeting can apply to the Court.

By the Companies (Winding-Up) Rules, 1921, the provisions of the Winding-Up Rules, 1909, as to meetings of creditors are extended to this meeting.⁴ The meeting is to be held at a place convenient to the majority of the creditors (Rule 125), seven days' notice of the meeting is to be given (Rule 123).

¹ *Re Sunlight Incandescent Gas Lamp Co.*, [1900] 2 Ch. 728.

² *Re Sheppy Portland Cement Co.*, [1892] W. N. 184, 68 L. T. 83.

³ To ascertain the names of the creditors the liquidator must consult the books of the company. If the number of creditors is very large he must do the best he can to give the required notice. Notice must be given to debenture holders and other secured creditors.

⁴ Rules 133, 135, 136, and 137 of the Winding-Up Rules, 1909, are not extended to voluntary liquidations. Rule 140A added in 1921 takes their place.

and forms of general and special proxy are to be forwarded by the liquidator with the notice (Rule 141). The proceedings of the meeting are valid, unless the Court otherwise orders, notwithstanding that notices may not have been received by some creditors (Rule 130).

The chairman of the meeting (who is the liquidator or some person appointed by him (Rule 127)) must cause minutes of the meeting to be kept (Rule 138) and may adjourn the meeting with its consent (Rule 131). He has power to adjudicate upon the right of a creditor to vote and the amount for which his vote is to be received, but this is subject to an appeal to Court (Rule 149A [2]). If a creditor holds a bill of exchange he must, for the purposes of voting but not of dividend, estimate and deduct the value to him of the liability of any person (not being bankrupt) who is liable thereon antecedently to the company and deduct it from his proof (Rule 134). A secured creditor unless he surrenders his security must lodge with the liquidator before the meeting a statement giving particulars of his security, the date when it was given, and the value at which he assesses it, and may only vote in respect of the balance of his debt. If he fail to comply with this rule his vote is not to be counted (Rule 149A [3]). This applies to mortgage debenture holders as well as to other secured creditors.

A resolution is passed when a majority *in number and value* of the creditors present personally or by proxy and voting on the resolution have voted in favour of it (Rule 128). Proxies may be used but must be lodged with the liquidator not later than four o'clock p.m. on the day before the meeting or adjourned meeting (Rule 147 [2]). The liquidator may himself be appointed a general or special proxy (Rule 145) but must not solicit proxies (Rule 144). If a creditor is incapable of writing he may sign or make his mark in the presence of a witness, who must fill up the proxy and certify that the insertions were made at the request of the creditor and in his presence (Rule 149). Three creditors entitled to vote constitute a quorum or if there are not three such creditors then all must attend to enable business to be done (Rule 132). The liquidator must file with the Registrar¹ a copy certified by him of every resolution of the meeting (Rule 129).

Canvassing for votes by the liquidator is prohibited, and on the application to the Court the applicant must, unless the Court otherwise directs, produce an affidavit by the proposed liquidator

¹ The "Registrar" referred to in the Rule is the Registrar of the Court which, having regard to the provisions of Section 131, has jurisdiction to wind up the company (see page 401, *supra*).

that no solicitation has been used by him or on his behalf in obtaining votes or procuring his appointment (Rule 149A [4]). The Court also requires an affidavit by the liquidator *appointed by the company* proving that the meeting of creditors was duly convened, and an affidavit by the chairman of the meeting stating the number of creditors present, the total amount of debts owing to them, the number of creditors voting for or against any resolution, and the total amount of debts owing to them in each case, and if a resolution for the appointment of a liquidator has been passed whether there has been any solicitation on behalf of the person nominated. The minutes of the meeting and the proxies used thereat must be exhibited to the affidavit (Practice Direction).

On the application being heard the Court may remove the liquidator appointed by the company and appoint another person, or may appoint some person to act jointly with the liquidator appointed by the company, and may, whether appointing a liquidator or not, make an order for the appointment of a committee of inspection, or make such other order as, having regard to the interests of the creditors and contributories of the company, may seem just. The Court ought, "without abandoning its discretion," to follow the wishes of the creditors if reasonable, particularly where the shareholders are not likely to receive anything in the winding-up, and the fact that the shareholders have appointed the receiver for debenture-holders as liquidator is a good reason for substituting the nominee of the creditors.¹ Sub-section 4 provides that "no appeal shall lie from any order of the Court" upon such application. In these extraordinary sub-sections there are no provisions as to how the committee of inspection are to be selected, or as to what their functions are to be. The Court, under its power to make "such other order as . . . may seem just," usually adopts some form of order which will incorporate some or all of the provisions as to the committee of inspection found in the case of a compulsory winding up (see page 518, *supra*). Rules may hereafter be made dealing with the case. The words "such other order as . . . may seem just" will no doubt be read as giving power to the Court only to make orders *ejusdem generis* with the matters specified before. There is no indication of the reason why all appeals are forbidden, and it is certainly curious that, where the steps are directed to be taken with so much promptitude that it will be difficult for foreign creditors to be represented at the

¹ Karamelli & Barnett, Limited, [1917] 1 Ch. 203. Neville, J., removed one of the liquidators appointed by the shareholders, but allowed him and the creditors applying their costs as between solicitor and client out of the assets of the company.

meetings, there should be no opportunity for an appeal in which new facts might be brought to the notice of the Court.

The costs of the application are in the discretion of the Judge,¹ who is expressly authorised to order the costs to be paid by the company, even though the application has failed, if he be of opinion that, having regard to the interests of the creditors, there were reasonable grounds for the application (Sub-section 5). Recently Swinfen Eady, J., although refusing an application, ordered the costs to be paid as costs in the winding up.

The meeting of creditors may be adjourned (Rule 131), but it is not clear whether the time within which the application is to be made to the Court, which is "not later than fourteen days after the date of the meeting," would be reckoned from the date fixed for holding the meeting or from the conclusion of the meeting. The Court will naturally incline to make the meeting an opportunity for an effective expression of the creditors' wishes, and it seems that the time will run from the latest adjournment.

The Court has power (under Section 186, ix.), "on cause shown," to remove any liquidator and appoint another in his place. To provide "cause" there must be some unfitness or unsuitability of the liquidator, either personal or arising from his connection with other parties or from the circumstances,² a reason often alleged being that the conduct of the promoters or directors is such that proceedings ought to be taken, but the liquidator is not sufficiently independent of them to take such proceedings.³ The removal of a liquidator is a matter of judicial discretion, and the Court of Appeal will not interfere if satisfied that there was "cause shown," but for this purpose it will consider the evidence.⁴ It will appoint a new liquidator if satisfied that it would be in the best interests of all concerned.⁵ The application to remove a liquidator cannot be made by any one not a creditor or contributory: *e.g.* a company which has purchased the assets cannot apply.⁶ There is no power given to the company itself to remove a liquidator when once he has been appointed. Where a summons to remove a liquidator is taken out on behalf of the applicant and all other shareholders the Court will not restrain the issue of a circular to the shareholders containing charges against the liquidator on the ground of contempt.⁷ The

¹ See note on page 530.

² See page 516, *supra*. *Sir John Moore Mining Co.*, [1879] 12 Ch. D. 325, *Adam Eyton, Limited*, [1887] 36 Ch. D. 290.

³ *Charterland Goldfields*, [1900] 26 Times L. R. 132.

⁴ *Re Urmston Grange Steamship Co.*, [1906] 17 Times L. R. 553.

⁵ *Baron Cigarette Machine Co.*, [1912] 28 Times L. R. 394.

⁶ *New De Kaap, Limited*, [1908] 1 Ch. 580.

⁷ *New Gold Coast Co.*, [1901] 1 Ch. 880.

Act provides expressly for the resignation of a liquidator in a compulsory winding up (see Section 149, Sub-section 6, and also Rule 162), but there is no similar provision in the case of a voluntary liquidation, although such resignation is contemplated by Section 189, which gives the company in general meeting¹ power to fill a vacancy caused by resignation. It would seem that such resignation must be made to a meeting of the members of the company, as there is nobody else to receive it; and if a voluntary liquidator desires to resign, he should summon a general meeting to receive his resignation and to appoint some other person as liquidator in his place.

There are no provisions for the release of a voluntary liquidator similar to those in the case of a company being wound up by the Court.

Powers of Voluntary Liquidator.

The powers of a liquidator in a voluntary winding up are wider than those of one when the winding up is by the Court. By Section 186 (iv.) a voluntary liquidator is given, without requiring the sanction of the Court, all the powers by the Act given to an official liquidator. These have already been stated on page 509, *supra*.

In addition, a voluntary liquidator has power under Section 186 (i.) and (v.) —

1. To settle the list of contributories,² and if necessary to rectify the Register.³
2. To make calls.
3. To adjust the rights of contributories among themselves.
4. To pay the debts of the company.
5. To distribute the property of the company in accordance with the rights of the persons interested.

He also has power—

6. To apply to the Court to determine questions, enforce calls, &c. (Section 193).
7. To call meetings of the company (Section 194).

¹ Such general meeting may be summoned by the continuing liquidator (if any), or by any contributory (Section 189, Sub-section 2), and be held in the manner prescribed by the Articles, or as directed by the Court on application by a contributory or continuing liquidator (Sub-section 3). The Rules of 1909 as amended in 1921 will not govern these meetings, for they are confined to meetings in a winding up by the Court and the meeting summoned under Section 188 (see Rules 122 and 149A (1)).

² The list, when settled by a voluntary liquidator, is only *prima facie* evidence of the liability of the persons named (Section 186, vi.).

³ *Brighton Arcade Co. v. Dowling*, [1868] L. R. 3 C. P. 175; *Taylor, Phillips and Rickard's Case*, [1896] 2 Ch. 859.

Moreover, with the sanction of an extraordinary resolution, he has power—

1. To make a compromise with creditors of the company or any class of them (Section 214, Sub-section 1 (ii.))¹
2. To make a compromise with the contributories or debtors of the company (Section 214, Sub-section 1 (iii.))¹

With the sanction of a special resolution, a voluntary liquidator may sell the whole or a portion of the business or property of the company in exchange for shares, policies, or other like interests in a purchasing company (Section 192).²

Lastly, with the previous sanction of the Court, the liquidator may prosecute delinquent directors, managers, officers, or members of the company (Section 217, Sub-section 2; see page 400, *supra*).

Section 215 applies to companies in voluntary liquidation, and proceedings against directors or officers for misfeasance can accordingly be taken by the liquidator or any creditor or contributory (see page 588, *infra*).

As to the general status of a liquidator see page 506, *supra*.

By Section 193 the liquidator or any contributory or creditor of a company being wound up voluntarily may apply to the Court "to determine any question arising in the winding up or to exercise, as respects the enforcing of calls, or any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court"; and the Court, if satisfied that the determination of such question or the required exercise of power will be just and beneficial, may accede thereto, wholly or in part, on such terms and conditions as the Court thinks fit, or make such other order as the Court thinks just. In this manner advantage of all the proceedings in the winding up by the Court may be had in a voluntary liquidation on the application of the liquidator or a contributory or creditor. Thus, questions of the liability of a contributory or the right of a creditor to prove may be tried on summons or motion in the winding up; or inspection of the books obtained (Section 221); or an order for the private examination of any person had

¹ Under this section a liquidator has power to effect compromises with the sanction of an extraordinary resolution of the company; but it has been held (*Cycle Makers' Co-operative Society v. Sims*, [1903] 1 K. B. 477) that a compromise made by the liquidator without such sanction binds the company, following a similar ruling in the case of a company being wound up under supervision (English and Scottish Marine Insurance Co., [1870] 23 L. T. N. S. 685). In bankruptcy it was held that a trustee in bankruptcy has unfettered power to effect a compromise in an action (*Leeming v. Lady Murray*, [1880] 13 Ch. D. 125), and in *Fox v. Pitts* (1897, unreported) the Privy Council applied the same rule to a liquidation under a Canadian Act.

² This is dealt with at length under "RECONSTRUCTION," page 620 *et seq.*, *infra*.

(Section 174); or calls may be enforced by a balance order (Section 165 and Rule 87); but the liquidator cannot use such a summons to obtain relief against a stranger: *e.g.* by seeking to enforce a claim against an alleged debtor to the company, or asking for rescission of a contract for sale.¹

If more than one liquidator is appointed, the company, at the time of their appointment, may determine that one or more of them may exercise any of these powers, and in default of such determination any number, not less than two, may exercise any of such powers (Section 186, vii.); but it is only at the time of their appointment that the company has the power of determination, and if there are two liquidators and one of them dies, the survivor cannot act until a new liquidator is appointed.²

"Where any company is being wound up, all books and papers of the company and of the liquidators shall, as between the contributories of the company, be *prima facie* evidence of the truth of all matters purporting to be therein recorded" (Section 220). It is to be noted that this section does not say "as between the contributories and the company," nor does it affect creditors, and appears only to constitute the books &c. evidence as between the contributories themselves.

The evidence is only *prima facie*, and may be rebutted.³

Remuneration of Liquidator.

The remuneration of the liquidator in a voluntary winding up is fixed by the company (Section 186, ii.), absolutely at its own discretion. If it does not fix any, the liquidator should apply to the Court to exercise its power in this respect, and there seems no reason why it should not do so, as Section 186 only prescribes that the company *may* fix such remuneration. The liquidator should, however, see that he has some arrangement at an early date, as the company is unfettered in regard to amount, and it is doubtful if the liquidator is entitled to a *quantum meruit*, and is not bound to accept whatever the company votes.⁴ In a case⁵ where the Official Receiver in the compulsory

¹ Centrifugal Butter Co., [1913] 1 Ch. 188.

² *Re Metropolitan Bank v. Jones*, [1870] 2 Ch. D. 366.

³ *Great Northern Salt Co.*, [1890] 44 Ch. D. 472; *Arnot's Case*, [1887] 36 Ch. D. 712.

⁴ A case came before the Court of Appeal where a company at the end of a voluntary liquidation which lasted five years voted that one of the liquidators should only receive his out-of-pocket expenses. From this the liquidator appealed to the Court to fix a proper remuneration. During the argument it appeared that the majority of the Court (Vaughan Williams and Stirling, L.J.J.) leaned to the view that the Court ought to fix a proper remuneration, but the case was compromised and no decision given.

⁵ *Re Amalgamated Syndicates*, [1901] 2 Ch. 181.

winding up of a company liable for the expenses of the voluntary winding up of three other companies applied to the Court as to the remuneration of the liquidators, it was held that the remuneration of the liquidator must depend on the circumstances, and the scale applicable to Official Receivers has no application. Where the Court fixes the remuneration the practice is, in the absence of special circumstances, to adopt as a guide the scale applicable to trustees in bankruptcy, which is on a percentage basis.¹

Where a supposed voluntary liquidation proves to have been irregularly commenced the liquidator has no claim for services rendered in the liquidation; but, so far as his services have been useful for other purposes or are subsequently adopted by the compulsory liquidator, he may be entitled to payment upon a *quantum meruit*.²

Section 188 contains no provisions as to the remuneration of a liquidator appointed by the Court on the application of creditors under that section, and it seems he will have only the same rights as a liquidator appointed by the company.

Accounts of Liquidator.

Section 224, relating to the filing of accounts, applies to voluntary liquidations as well as to windings up by the Court,³ and the matters set out at page 512, *supra*, must therefore have attention.

There is no provision for the audit of the accounts of a voluntary liquidator. He may be questioned at meetings of the contributories, which he is required to summon once a year, and before which he must lay his accounts (Section 194. Sub-section 2), and the statements of account filed by him (see page 512, *supra*) are open to inspection; but there is no one to enforce the production of vouchers &c., although there can be no doubt that, if satisfied of any irregularity, the Court would enforce the making and substantiating of a proper account at the instance of a contributory.⁴ Moneys remaining in the hands of a voluntary liquidator for more than six months, representing unclaimed or undistributed assets, must be paid into the Companies Liquidation Account at the Bank of England as in a compulsory winding up (Section 224).

¹ *Carton, Limited, re*, [1922] 128 L. T. 629.

² *Allison, Johnson & Foster*, [1904] 2 K. B. 327.

³ *Stock and Share Auction Co.*, [1894] 1 Ch. 736.

⁴ *Wright's Case*, [1870] 5 Ch. 437. In the *Camina Nitrate Co.'s Case*, 2nd March, 1909 (unreported), *Swinfen Eady, J.*, the liquidator consenting, ordered the accounts of a voluntary liquidator to be taken into court, but suggested that a more reasonable course would be to direct that the shareholders concerned should be given an opportunity of inspecting the books by their accountant.

The liquidator must, for his own protection, keep proper books of account, for if money is traced into the possession of a trustee the burden falls on him of proving that it has been properly expended.

If a liquidator does not pay over the moneys for which he is responsible, application may be made for an order that he shall do so, and if he fail to comply with such order he may be committed to prison, for "default by a trustee or person acting in a fiduciary capacity, and ordered to pay by a Court of Equity any sum in his possession or under his control," constitutes an exception to Section 4 of The Debtors Act, 1869, which abolishes imprisonment for debt, and Equity regards money of which a trustee has once had possession as still in his possession until he has properly discharged himself; but this does not extend to interest which he ought to have, but has not, received.¹

MEETINGS DURING WINDING UP.

The liquidator in a voluntary winding up must summon the original meeting of creditors required by Section 188; but, with this exception, he is not required to summon meetings of creditors. By Section 194, however, he is empowered from time to time to summon meetings of the company (*i.e.* the contributories) "for the purpose of obtaining the sanction of the company by special or extraordinary resolution, or for any other purposes he may think fit," and if the winding up continues for more than a year he is *required* to summon a general meeting of the company at the end of the first year and of each succeeding year, and to "lay before the meeting an account of his acts and dealings and of the conduct of the winding up during the preceding year."

The Rules as to general meetings referred to at pages 502 and 503, *supra*, do not apply in a voluntary liquidation, and the Companies (Winding-Up) Rules, 1921, extended them only to the meeting of creditors held under Section 188 (see page 528, *supra*). There are no Rules governing other meetings of creditors in a voluntary liquidation. Meetings of contributories will in general be governed by the same regulations as were in force in regard to meetings before the company went into liquidation (see Section 189).

Several matters require the sanction of resolutions of general meetings: *e.g.* arrangements with creditors (Section 191, extraordinary resolution); filling vacancies in the office of liquidator (Section 189, ordinary resolution); disposal of books on dissolution (Section 222, extraordinary resolution); payments to classes of creditors or compromises (Section 214, extraordinary resolution); compromises generally (Section 214, extraordinary resolution); sale

¹ Middleton v. Chichester, [1871] 6 Ch. 152.

of assets for shares or other interests in the purchasing company (Section 192, special resolution). A final meeting before dissolution must be held under Section 195 to receive the liquidator's accounts, as described below.

FINAL WINDING-UP MEETING AND DISSOLUTION.

As soon as the affairs of the company are fully wound up the liquidator is required to prepare an account showing how the winding up has been conducted and the property of the company disposed of, and to call a final general meeting of the members for the purpose of laying his account before them, of giving any explanations that may be required (Section 195), and of obtaining, by extraordinary resolution, the direction of the members as to the disposal of the books, accounts, and other documents (Section 222). Notice of this meeting has to be advertised at least one month beforehand in the *London, Edinburgh, or Belfast or Dublin Gazette*, according as the company was registered in England, Scotland, or Northern or Southern Ireland (Section 195), and the extraordinary resolution should be printed and registered in accordance with Section 70.

A similar notice should also be sent to the members in the manner prescribed for giving notices. It is also advisable to add an intimation to the following effect:—"The foregoing notice was duly advertised in the [*London, Edinburgh, or Belfast or Dublin Gazette*, as the case may be] on _____ in accordance with Section 195 of The Companies (Consolidation) Act, 1908."

Unless authorised by the final resolution to deal otherwise with the books and papers of the company, the liquidator or other person to whom their custody has been entrusted should retain possession of them for five years from the date of the company's dissolution, after which "no responsibility shall rest on the company, or the liquidators, or any person to whom the custody of the books and papers has been committed, by reason of the same not being forthcoming to any person claiming to be interested therein" (Section 222).

The liquidator must within one week after such meeting make (on the prescribed form) what is called a "Return of the Final Winding-Up Meeting," to the Registrar of Companies, who must forthwith register it (Section 195, Sub-sections 3 and 4). Neglect to make the Return renders the liquidator liable to a penalty of five pounds for every day until the Return is registered (Sub-section 3). This Return has to be impressed with a five-shilling fee stamp.

On the expiration of three months from the date of the registration of the Return of the Final Winding-Up Meeting

"the company shall be deemed to be dissolved" (Section 195, Sub-section 4), and the name of the company will be removed from the Register at the Companies Registration Office. The Registrar will then be at liberty to register any other company under the same name as the old one, if such name has not already been taken by consent.

But the Court has power, under the same sub-section, "on the application of the liquidator or of any other person who appears to the Court to be interested," to make an order deferring the date at which the dissolution of the company is to take effect for such time as to the Court seems fit, which order must be filed with the Registrar by the person on whose application it is made (Sub-section 5), and even after the dissolution the Court may at any time within two years of the date of the dissolution, on a like application, make an order, on such terms as the Court thinks fit, declaring the dissolution to have been void, whereupon such proceedings may be taken as might have been taken if the company had not been dissolved (Section 223). This power will be exercised where upon a reconstruction the new company, after agreeing to satisfy the liabilities of the old company, has failed to perform its obligation and the old company has been dissolved¹. The Court when considering whether to set aside the dissolution will order the Attorney-General to be served to ascertain whether the Crown makes any claim to the assets as *bona vacantia*². The person obtaining the order must within seven days after the making of the order file an office copy of it with the Registrar under a penalty not exceeding five pounds a day for default (Sub-section 2).

It should be observed by voluntary liquidators that if the liquidation is not concluded within twelve months from the confirmation of the special resolution or the passing of the extraordinary resolution to wind up, they will then have to make periodical returns of their receipts and expenditure to the Registrar of Companies, and pay any money of the company remaining in their hands into the Companies Liquidation Account at the Bank of England (Section 224). This provision practically means that, to escape having to make these returns and pay into the Bank of England, the liquidation should be completed and the final meeting held within *nine* months, as the liquidation is not "concluded" until three months after the Return of the Final Winding-Up Meeting has been registered, and all funds have either been distributed or paid into the Companies Liquidation Account at the Bank of England (see Rule 188).

¹ Spottiswoode, Dixon & Hunting, Limited, [1912] 1 Ch. 410.

² Henderson's Nigel Company, [1911] 105 L. T. 370.

CHAPTER III.

WINDING UP UNDER SUPERVISION OF THE COURT.

WHERE a company has gone into voluntary liquidation, and some of the creditors or contributories desire that the conduct of the liquidation should be under the control of the Court, they may apply by petition to the Court for an order that the winding up shall be continued subject to the supervision of the Court in the same manner as they would apply for a compulsory winding up by the Court (Section 200), and the Court may thereupon make an order for the continuance of the winding up subject to such supervision, and with such liberty for creditors, contributories, or others to apply to the Court, and generally upon such terms and subject to such conditions as the Court thinks just (Section 199): that is to say, the Court may leave in the hands of the liquidators whatever of their powers it thinks fit, and may exclude from their powers whatever matters it thinks ought to be reserved to the Court.

It has been said that the Court will not as a rule make a supervision order on the application of a contributory,¹ even if it be alleged that the liquidators are guilty of misconduct²; but recently such orders have not been uncommon, and on the application of a creditor the order will be made, the Court having regard to the wishes of the majority of the creditors and contributories (Section 201). It was said in an early case that if the liquidator was guilty of misconduct the creditors should not petition for a supervision order, but should apply in chambers for the removal of the liquidator³; but such misconduct is a ground for obtaining a compulsory order, for the creditors are prejudiced.⁴ If the company is insolvent and the creditors desire a supervision order, the opposition of contributories will not be regarded.⁵

As Section 193 gives any contributory or creditor a right to apply to the Court in a voluntary winding up, there is very little to be gained by a supervision order.

The Court is not often willing to make the order.⁶ Special grounds, however, may exist—as, for instance, the desire of the

¹ London and Mercantile Discount Co., [1866] 1 Eq. 277; Beaujolaix Wine Co., [1908] 3 Ch. 15; *re* Gold Co., [1879] 11 Ch. D. 701, 718; Varieties, Limited, [1893] 2 Ch. 235.

² Star and Garter Hotel Co., [1873] 23 L. T. 255; Yorkshire Fibre Co., [1870] 9 Eq. 660.

³ London and Mediterranean Banking Co., [1867] 15 W. R. 33, 15 L. T. 153.

⁴ Caerphilly Colliery Co., [1875] 32 L. T. 15.

⁵ Prince of Wales Slate Quarry, [1863] 19 L. T. 77.

⁶ Thirteen such orders were, however, made in 1923.

creditors to have an additional or substituted liquidator appointed to represent them, or to have an advisory body similar to a committee of inspection nominated.¹ These objects, however, are attainable by an application under Section 188 by a creditor appointed for the purpose at the first meeting of creditors (see page 528, *supra*). A supervision order is also sometimes asked 'in order to have a declaration made that some particular act shall not be done without the sanction of the Court, or to have a scheme of reconstruction brought before the Court, for by Section 192 any resolution passed under that section is invalid if an order for winding up by the Court or under supervision is made within a year, unless the sanction of the Court is obtained and a compulsory order has been made with this object,² but unless there is fraud in connection with the scheme or in the winding up the Court will not make the order.³

If the resolution for voluntary winding up is invalid, the Court cannot make a supervision order, for there is no winding up to be continued.⁴ The evidence should, therefore, prove the due passing of the winding-up resolution.

A supervision order may be made on a petition for a compulsory order; but if the petition has been advertised as asking for a compulsory order only, the Court usually will not make a supervision order unless the petition is amended and re-advertised.⁵

The Court has regard to the wishes of the majority of creditors and contributories in determining whether to make a compulsory or supervision order (Section 201), and in case of difference prefers the wishes of the creditors, unless their debts are small and well secured (see page 479, *supra*).

The Court may appoint additional liquidators to act with those already appointed by the company, and subsequently, on due cause shown, may remove any liquidator so appointed, or any liquidator continued under the supervision order, or fill up any vacancy in the office (Section 202). The Court may also (under Section 186 (ix.) and Section 203, Sub-section 2), "on cause shown," remove a liquidator appointed by the company before the supervision order.⁶ A liquidator appointed by the Court has to give security, whether the voluntary liquidator has to do so or not.⁷

¹ This can be done (*W. Watson & Sons*, [1891] 2 Ch. 55).

² *Consolidated South Rand Mines*, [1909] 1 Ch. 401.

³ *Bridport Old Brewery Co.*, [1867] 2 Ch. 101; *Patent Floorcloth Co.*, [1860] 8 Eq. 664.

⁴ *Callao Bis Company*, [1889] 42 Ch. D. 169.

⁵ *New Morgan Gold Mining Co.*, [1893] W. N. 79; *New Oriental Bank*, [1892] 3 Ch. 563.

⁶ *Ex parte Pulbrook*, [1863] 2 De G. J. & S. 348; *United Merthyr Collieries Co.*, [1867] 13 L. T. 170.

⁷ *Hampshire Land Co.*, [1894] 2 Ch. 632.

The making of the order gives to the Court all the powers which it would have in a winding up by the Court, but except so far as the order places restrictions on the liquidators they continue to have all the powers and duties which they would have in a voluntary winding up (Section 203). None of the provisions as to first meetings of creditors and contributories, or the intervention of the Official Receiver or the committee of inspection, applicable to a winding up by the Court, applies to a supervision, but in other respects the powers of the Court and provisions as to stay of proceedings and enforcement of calls have effect as if the order were for winding up by the Court (Section 203, Sub-section 2).

The liquidation is deemed to commence from the date of the resolution for winding up, and not from the presentation of the petition, for the order merely continues the existing winding up. The Court has no power to alter the date: *e.g.* where a petition for a compulsory order preceded the voluntary liquidation and a provisional liquidator was appointed it was held the Court could not direct that the commencement of the winding up should date back to the petition or the appointment of the provisional liquidator.¹

The costs in a winding up under supervision incurred after the order for such winding up have the same priority as in a winding up by the Court²; but the order should provide that the costs and remuneration of the liquidator are to be allowed only after they have been taxed by the Registrar.³

The Court also usually orders the liquidator to report from time to time the progress of the winding up,⁴ and may attach to the exercise of the liquidator's powers a condition that he shall obtain the sanction of a committee of creditors or contributories, thus practically establishing a committee of inspection.⁵

The practice as to a petition for a supervision order is the same as that on petition for an order that the company be wound up by the Court (see page 486 *et seq.*, *supra*). The petition must be served both on the company and the liquidator (Rule 28, following the practice formerly adopted by the Court).

The Court may, both before and after the order is made, direct meetings of creditors and contributories to be held to ascertain their wishes, naming the chairman. In case of a division

¹ West Cumberland Iron Co., [1890] 40 Ch. D. 361.

² *Re* New York Exchange, [1893] 1 Ch. 371.

³ See W. N., 1893, 5 and 18.

⁴ Pritchard, Offor & Co., [1893] W. N. 153. This time is now usually "on each quarter-day" (Horner & Co., [1898] W. N. 159, 5 Mans. 355).

⁵ W. Watson & Sons, [1891] 2 Ch. 55.

regard must be had to the value of the debt due to each creditor and to the number of votes conferred on each contributory by the regulations of the company (Sections 201 and 219).

If a supervision order is made, the date for determining whether a payment is a fraudulent preference is three months before the presentation of the petition for the supervision order, and not the commencement of the voluntary winding up (Section 210, Sub-section 2). This may form a good reason for not making an order, as it might validate payments which would otherwise be void.

The presentation of the petition for a supervision order gives the Court the same jurisdiction to stay suits and actions as if the petition were for a compulsory order, and when the order is made it has the like effect in automatically staying actions, suits, and other proceedings (Section 203, Sub-section 2; see page 544 *et seq.*, *infra*).

When the order is made the liquidator may, "subject to any restrictions imposed by the Court, exercise all his powers, without the sanction or intervention of the Court, in the same manner as if the company were being wound up altogether voluntarily": that is to say, except so far as the order restricts him, the liquidator may act as freely as in a voluntary liquidation (Section 203, Sub-section 1).

In cases where in a voluntary winding up the sanction of an extraordinary resolution would be required for any act, in a winding up under supervision the sanction of the Court is necessary. Thus, the disposal of the books of the company on the completion of the winding up (Section 222), compromises with creditors or contributories (Section 214), and sales of the assets of the company for shares in another company (Section 192) in the case of a winding up under supervision require the sanction of the Court.

A winding up under supervision also differs from a voluntary liquidation in the fact that Sections 205 and 211 apply to the former and not to the latter. By Section 205 "every disposition of the property (including things in action) of the company, and every transfer of shares, or alteration in the status of its members, made after the commencement of the winding up" (*i.e.* the date of the resolution for the voluntary winding up), "shall, unless the Court otherwise orders, be void"; and by Section 211 "any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding up shall be void to all intents." In relation to these matters, therefore, it is not necessary to make any application to the Court, as the law automatically avoids them (see page 544 *et seq.*). But Section 211 applies only to companies registered in England or Ireland.

When a supervision order has been made, the liquidators (including the additional liquidator, if any, appointed by the Court) proceed in the same manner as if there were no such order, except in matters expressly dealt with in the order. The proofs of debts by creditors, the settling of the list of contributories, the making of calls, and the getting in and distributing of assets are therefore governed by the considerations set forth in the case of a voluntary liquidation.

An arrangement with creditors entered into under Section 191 while a company is being wound up under supervision, if sanctioned under Section 193, is binding, for the power of compromise given by Section 214 is additional to and not in substitution for the power given by Section 191,¹ and, indeed, the liquidator has a power of compromise even without any sanction.²

An order continuing a voluntary winding up under supervision is not a bar to the making of a subsequent order for a compulsory winding up, and the Court is empowered in Scotland or Ireland to appoint the voluntary liquidators, or any of them, either provisionally or permanently, and either with or without other persons, to be liquidators in the compulsory winding up (Section 204); but in England it would be necessary to comply with the provisions of the Act as to holding meetings to consider the appointment of liquidators and the like,³ and if they approve the continuance of the voluntary liquidator there is no reason why the Court should not appoint him.

If the supervision order is superseded by a compulsory order it seems the winding up will commence from the presentation of the petition for the compulsory order,⁴ which may affect the liability of past members and claims to set aside debentures under Section 212.

¹ *Anglo-Romano Water Co.*, [1870] 5 Ch. 437.

² *English and Scottish Marine Insurance Co.*, [1870] 23 L. T. 685. *Cycle Makers' Co-operative Society v. Sims*, [1903] 1 K. B. 477. See page 533, note ¹, *supra*.

³ *Re John Reid & Sons*, [1900] 2 Q. B. 634.

⁴ *Taurine Co.*, [1883] 25 Ch. D. 118, overruling *United Service Co.*, [1868] 7 Eq. 70.

regard must be had to the value of the debt due to each creditor and to the number of votes conferred on each contributory by the regulations of the company (Sections 201 and 219).

If a supervision order is made, the date for determining whether a payment is a fraudulent preference is three months before the presentation of the petition for the supervision order, and not the commencement of the voluntary winding up (Section 210, Sub-section 2). This may form a good reason for not making an order, as it might validate payments which would otherwise be void.

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In cases where in a voluntary winding up the sanction of an extraordinary resolution would be required for any act, in a winding up under supervision the sanction of the Court is necessary. Thus, the disposal of the books of the company on the completion of the winding up (Section 222), compromises with creditors or contributories (Section 214), and sales of the assets of the company for shares in another company (Section 192) in the case of a winding up under supervision require the sanction of the Court.

A winding up under supervision also differs from a voluntary liquidation in the fact that Sections 205 and 211 apply to the former and not to the latter. By Section 205 "every disposition of the property (including things in action) of the company, and every transfer of shares, or alteration in the status of its members, made after the commencement of the winding up" (*i.e.* the date of the resolution for the voluntary winding up), "shall, unless the Court otherwise orders, be void"; and by Section 211 "any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding up shall be void to all intents." In relation to these matters, therefore, it is not necessary to make any application to the Court, as the law automatically avoids them (see page 544 *et seq.*). But Section 211 applies only to companies registered in England or Ireland.

When a supervision order has been made, the liquidators (including the additional liquidator, if any, appointed by the Court) proceed in the same manner as if there were no such order, except in matters expressly dealt with in the order. The proofs of debts by creditors, the settling of the list of contributories, the making of calls, and the getting in and distributing of assets are therefore governed by the considerations set forth in the case of a voluntary liquidation.

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If the supervision order is superseded by a compulsory order it seems the winding up will commence from the presentation of the petition for the compulsory order,⁴ which may affect the liability of past members and claims to set aside debentures under Section 212.

¹ *Anglo-Romano Water Co.*, [1870] 5 Ch. 437.

² *English and Scottish Marine Insurance Co.*, [1870] 23 L. T. 685. *Cycle Makers' Co-operative Society v. Sims*, [1903] 1 K. B. 477. See page 533, note 1, *supra*.

³ *Re John Reid & Sons*, [1900] 2 Q. B. 634.

⁴ *Taurine Co.*, [1883] 25 Ch. D. 118, overruling *United Service Co.*, [1868] 7 Eq. 76.

CHAPTER IV.

THE CONDUCT OF THE LIQUIDATION.

IN all liquidations (whether compulsory, voluntary, or under supervision) many matters are dealt with in the same manner. These will now be considered, any differences in the respective methods of procedure being noted.

PROCEEDINGS AGAINST A COMPANY IN LIQUIDATION.

Actions, Executions, Distresses.

After a company is in liquidation, or a petition has been presented for its winding up by the Court or under supervision, proceedings by creditors against the company cannot be taken or continued at the will of the creditor. But there is this distinction: If an Order of Court has been made for a winding up (compulsorily or under supervision) all proceedings are automatically stayed, but the Court may, on the application of the creditor, allow them to be continued; while in a voluntary winding up, or where a petition has been presented, but not adjudicated upon, there is no automatic stay, but the Court may, on application being made to it by interested parties, restrain further proceedings against the company or its property. This is the effect of Sections 140, 142, 200, and 203 of the Act, and in a voluntary liquidation by calling in aid Section 193.

Thus in a voluntary winding up the Court may, upon the application of the liquidator or a contributory or creditor, restrain actions,¹ executions,² and distresses,³ and, if the proceedings were commenced with knowledge of the voluntary winding up, may order the plaintiff to pay the costs of the proceedings.⁴ The power of the Court is discretionary, and in the case of a pending action it will inquire what course is most convenient. If the claim is undisputed a stay will be granted as of course, but if the debt is disputed it will often be considered most convenient to allow the action to proceed.⁵

The application to stay proceedings after a petition is presented, or in a voluntary winding up, is made on summons in England or Ireland in the Division of the High Court or Court of Appeal in

¹ *Keynsham Co.*, [1863] 33 Beav. 123; *Freeman v. General Publishing Co.*, [1894] 2 Q. B. 360.

² *Thomas v. Patent Lionite Manufacturing Co.*, [1881] 17 Ch. D. 250; *Westbury v. Twigg & Co.*, [1892] 1 Q. B. 77.

³ *Roundwood Colliery Co.*, [1897] 1 Ch. 373.

⁴ *Freeman v. General Publishing Co.*, [1894] 2 Q. B. 380.

⁵ *Currie v. Consolidated Kent Collieries*, [1906] 1 K. B. 134.

which the proceedings are pending, and the application is intituled in the action in which the proceedings are being had,¹ and if there are several proceedings, as in the case of King's Bench actions by creditors for various debts, they may all be stayed on one summons.² In any other case—*e.g.* in Scotland or when the proceedings are in the County Court—the application is made to the Winding-Up Court (Section 140). If judgment has been obtained, and execution is levied or threatened, this is still a proceeding in the action in which judgment was obtained, and the application must be made to the Court in which the judgment was obtained.³ Unless very exceptional circumstances exist, the Court in its discretion will always stay an execution levied against a company, after it has gone into voluntary liquidation, so as to prevent the judgment creditor from obtaining an advantage over other creditors.⁴ The plaintiff in the action which is stayed is entitled to the costs of the application to stay from the applicant.⁵

A sale by the sheriff under an execution put in before the presentation of the petition is a "proceeding" which may be restrained⁶; but the Court will look at the rights acquired before the petition is presented, and, as a judgment creditor who has procured the sheriff to take possession before the petition is a secured creditor, the Court will not, except in very special circumstances, deprive him of his security,⁷ and the same rule applies if the sheriff seeks to take possession before liquidation and is resisted,⁸ or, it seems, if the creditor was put off by representations of the company,⁹ or trickery.¹⁰ Where a sheriff has seized before the presentation of the petition it is his duty under The Landlord and Tenant Act, 1709, to pay to the landlord any rent not exceeding one year's rent due at the time of the seizure, and this continues to be his duty when a petition is presented after the seizure although the landlord's right to distrain is affected by such presentation.¹¹ The order staying the proceedings frequently provides that the liquidator shall sell,

¹ Artistic Colour Printing Co., [1880] 14 Ch. D. 502; General Service Stores, [1891] 1 Ch. 490.

² People's Garden Co., [1876] 1 Ch. D. 44.

³ Artistic Colour Printing Co., [1880] 14 Ch. D. 502.

⁴ Anglo-Baltic and Mediterranean Bank v. Barber & Co., [1924] W. N. 206.

⁵ Pierce v. Wexford Picture House Co., [1915] 2 I. R. 310.

⁶ Perkins v. Beach & Co., [1878] 7 Ch. D. 317.

⁷ Great Ship Co., Parry's Case, [1904] 4 De G. J. & S. 63, 33 L. J. Ch. 245; Withernsea Brick Works, [1881] 16 Ch. D. 337.

⁸ London Cotton Co., [1868] 2 Eq. 53.

⁹ Re Taylor, [1878] 8 Ch. D. 183. But see Vron Colliery Co., [1892] 20 Ch. D. 442.

¹⁰ Armorduct Co. v. General Incandescent Co., [1911] 2 K. B. 143.

¹¹ British Salicylates, Limited, [1919] 2 Ch. 155.

the priority of the creditor being reserved by a charge on the proceeds of sale, or, if there are more execution creditors than one, by charges in the order in which their executions were levied.¹

The object of a winding up is to enable an equal distribution of the assets to be made among the creditors, preserving, however, the rights of any who have securities,² and therefore where the assets have not been actually seized before the petition the Court will, in the absence of special circumstances, stay proceedings and either restrain the sheriff from seizing, or, if he has actually taken possession after the presentation of the petition, will order him to withdraw.³ The rule with regard to garnishee proceedings is the same, service of the garnishee order on the garnishee being equivalent to the taking possession by the sheriff. When, therefore, the order has not been served before the presentation of the petition the Court will restrain further proceedings.⁴

Under The Bankruptcy Act, 1914 (Sections 40 and 41), execution creditors in the case of individual debtors lose the benefit of their execution if before completion of the execution the sheriff receive notice of bankruptcy petition or of the commission of an act of bankruptcy; but this provision of the bankruptcy law does not extend to the case of companies, whether solvent or insolvent.⁵

The above principles govern the Court whether it is asked to stay proceedings against a company in voluntary liquidation or to allow proceedings to be continued against a company in compulsory liquidation.

When an order is made for winding up in England or Ireland, whether compulsorily or under supervision, "any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding up shall be void to all intents" (Section 211); but this latter provision is controlled by Sections 140 and 142, so that with the leave of the Court execution &c. may issue.⁶ Therefore when a winding-up order has been made, instead of the company applying to the Court to restrain the creditor, the creditor must ask leave before he can proceed.

¹ Hill Pottery Co., [1865] L. R. 1 Eq. 640; Plas-yn-Mhowys Coal, Cannel, and Ironstone Co., [1867] L. R. 4 Eq. 689; *re* Taylor, [1878] 8 Ch. D. 183; Pen'allt Silver Lead Mining Co., [1871] 15 Sol. J. 714.

² See Smith, Fleming & Co.'s Case, [1866] 1 Ch. 545.

³ London and Devon Biscuit Co., [1871] 12 Eq. 100; Dimson Estate Fire-clay Co., [1874] 19 Eq. 202; *ex parte* Railway Steel Co., *re* Williams, [1878] 8 Ch. D. 183; Bowkett v. Fullers United Electric Works, [1923] 1 K. B. 100.

⁴ Stanhope Silkstone Collieries, [1879] 11 Ch. D. 160.

⁵ Withernsea Brick Works, [1881] 16 Ch. D. 337.

⁶ Exhall Coal Mining Co., [1861] 4 De G. J. & S. 377; *re* Lancashire Cotton Spinning Co., *ex parte* Carnelley, [1887] 35 Ch. D. 656; Hugginsshaw Mills and Spinning Co., [1896] 2 Ch. 544.

The Court will allow actions to proceed where the company is a necessary party to an action against other persons,¹ or proceedings are necessary to enforce a charge or vendor's lien²; indeed it is now almost a matter of course to allow a foreclosure suit or debenture holder's action to proceed,³ for the proceeding being to enforce a security is in reality rather against the property of the company than against the company itself. Actions for specific performance of agreements are also allowed to proceed.⁴ In each case the respective convenience of the alternative remedies will be considered. In other cases the creditor should prove in the winding up.

The Court has power under Rule 42 of the Winding-Up Rules to transfer all actions or matters by or against the company in other courts to the Winding-Up Judge, and may exercise this power even though there are other persons co-defendants with the company.⁵

The Court, in allowing proceedings by parties other than mortgagees, will usually attach a condition that no steps will be taken to enforce the judgment against the company without further leave.

Where a distress has been levied before a winding-up but not completed by sale the Court has power to restrain further proceedings, but will only do so if special circumstances exist rendering a sale inequitable,⁶ but a landlord will not be allowed to distrain after a winding-up for rent accrued before the commencement of the winding up, for he is a creditor in respect of such rent, and should prove in the winding up⁷; and where a landlord levied after a winding up for rent payable in advance he was held entitled to payment in full for the period the liquidator remained in occupation, but only to prove for the balance⁸; but where a landlord distrained before the winding up for rent payable in advance covering a period after the winding up, he was allowed to proceed and recover the whole amount.⁹

¹ *Rio Grande do Sul Steamship Co.*, [1877] 5 Ch. D. 282; *Marshall v. Glamorgan Iron and Coal Co.*, [1868] 7 Eq. 129; *McEwen v. London and Bombay Bank*, [1866] 15 L. T. 496; *re Marine Investment Co.*, [1866] 14 L. T. 535.

² *Blakely v. Dent*, [1867] 15 W. R. 663.

³ *Lloyd v. Lloyd & Co.*, [1877] 6 Ch. D. 339; *re Pound, Son & Hutchings*, [1889] 42 Ch. D. 402; *Wanzer, Limited*, [1891] 1 Ch. 305; *West Cumberland Iron and Steel Co.*, [1893] 1 Ch. 713; *Barney v. Stubbs, Limited*, [1891] 1 Ch. 187, 475; *Strong v. Carlyle Press*, [1893] 1 Ch. 268.

⁴ *Thames Plate Glass Co. v. Land and Sea Construction Telegraph Co.*, [1871] 6 Ch. 643; *Marshall v. Glamorgan Iron and Coal Co.*, [1868] 7 Eq. 129.

⁵ *Pacaya Rubber Company*, [1913] 1 Ch. 218.

⁶ *Roundwood Colliery Co.*, [1897] 1 Ch. 373.

⁷ *Traders (North Staffordshire) Carrying Co.*, [1875] 19 Eq. 60, 44 L. J. Ch. 172; *Oak Pits Colliery Co.*, [1882] 21 Ch. D. 322.

⁸ *Shuckell & Co. v. Chorlton & Sons*, [1895] 1 Ch. 378.

⁹ *Venner's Electrical Cooking, Limited, v. Thorpe*, [1915] 2 Ch. 404.

THE CONDUCT OF THE LIQUIDATION.

A distress, moreover, will not be restrained if the company is sub-lessee, and the distress is by the head landlord, for there is no privity between them, and therefore no debt for which the landlord can prove¹; but if the company has given the over-landlord a security, so that he can prove in the liquidation, he will not be allowed to distrain.² If the assets are so heavily charged as to belong in effect to the debenture holders the Court will not interfere to prevent a distress.³ The Court will generally allow the landlord to re-enter if the rent is not paid.⁴ Where a sheriff has seized under a *fi. fa.* before the presentation of the petition and has been allowed by the Court to sell the goods seized, he must pay to the landlord the amount of rent due (not exceeding one year's rent) although the landlord has not distrained.⁵

The landlord is not a secured creditor in England,⁶ but is in Scotland.⁷ If the liquidator has had a beneficial occupation since the winding up the Court will allow distress for rent as from the date of the winding up,⁸ but not if the liquidator has merely abstained from getting rid of the property,⁹ or where the occupation has been for the benefit of both parties¹⁰; and *semble* a mortgagee is in a less favourable position than a landlord.¹⁰ If the liquidator has retained beneficial occupation to the end of of the lease the landlord's claim for breaches of covenant (*e.g.* dilapidations) must be paid in full and not be made the subject of a dividend.¹¹

These sections do not apply to proceedings in Foreign or Colonial Courts,¹² but the English Court will restrain proceedings in Scotland or Ireland.¹³

¹ *Re Carriage Co-operative Supply Association, ex parte Clemence*, [1883] 23 Ch. D. 154; *re Lundy Granite Co., ex parte Heaven*, [1871] 6 Ch. 462; *Regent United Service Stores*, [1878] 8 Ch. D. 61.

² *Harpur's Cycle Fittings Co.*, [1900] 2 Ch. 731, not following *ex parte Clemence, supra*, on this point.

³ *New City Club*, [1887] 34 Ch. D. 646; *Harpur's Cycle Fittings Co.*, [1900] 2 Ch. 731.

⁴ *General Trust Co.*, [1882] 20 Ch. D. 266.

⁵ *British Salicylates, Limited*, [1910] 2 Ch. 155.

⁶ *Thomas v. Patent Lionite Manufacturing Co.*, [1891] 17 Ch. D. 250.

⁷ *Wanzer, Limited*, [1891] 1 Ch. 305.

⁸ *Re Lundy Granite Co., ex parte Heaven*, [1871] 6 Ch. 462; *North Yorkshire Iron Co.*, [1878] 7 Ch. D. 601.

⁹ *Oak Pits Colliery Co.*, [1882] 21 Ch. D. 322.

¹⁰ *Re Lancashire Cotton Spinning Co., ex parte Carnelley*, [1897] 35 Ch. D. 656.

¹¹ *Levi & Co., Limited*, [1910] 1 Ch. 416.

¹² *Ex parte Scinde Railway Co.*, [1874] 9 Ch. 500.

¹³ *Thurso New Gas Co.*, [1880] 42 Ch. D. 486; *Hermann Loog, Limited, Ramsay's Case*, [1887] 36 Ch. D. 502; *International Patent Pulp and Paper Co.*, [1876] 3 Ch. D. 594.

CREDITORS.

Section 206 governs a company in liquidation whose assets are sufficient for the payment of its debts and liabilities and the costs of winding up (that is to say, companies which are solvent as regards their creditors), and enacts in such case that "all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claims as may be subject to any contingency or sound only in damages, or for some other reason do not bear a certain value."

By Section 207, "in the winding up of any insolvent company registered in England or Ireland the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of bankruptcy in England or Ireland, as the case may be, with respect to the estates of persons adjudged bankrupt."

This section replaces Section 10 of The Judicature Act, 1875, which has been the subject of much judicial discussion. It is now settled that the Bankruptcy Rules which are to be applied in the winding up of insolvent companies are only those which relate to (1) The respective rights of the secured and unsecured creditors, including the rights of secured creditors *inter se* and unsecured creditors *inter se*¹; (2) The debts and liabilities provable; (3) The valuation of annuities and future and contingent liabilities; and (4) Mutual credit and set-off.² The section does not import into the winding up of companies the Rules which relate to the avoidance of securities or priorities,³ or allow the trustee to disclaim onerous property and contracts,⁴ nor does it deal with reputed ownership⁵ or fraudulent preferences, except

¹ *Re Whitaker, Whitaker v. Palmer*, [1901] 1 Ch. 9, disapproving *re Maggi, Winehouse v. Winehouse*, [1892] 20 Ch. D. 545.

² *Williams v. Hopkins*, [1881] 18 Ch. D. 370; *Allison Street Co.*, [1878] 7 Ch. D. 547; *Withernsea Brick Works*, [1881] 16 Ch. D. 337; *Tadman v. d'Epineuil*, [1882] 20 Ch. D. 217; *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.*, [1884] 9 Q. B. D. 648, 9 App. Ca. 434; *Sovereign Life Assurance Co. v. Dodd*, [1892] 2 Q. B. 573.

³ Such as those of an execution creditor (*Richards & Co.*, [1879] 11 Ch. D. 676; *Withernsea Brick Works*, [1881] 16 Ch. D. 337; *Hille India Rubber Co.*, [1897] W. N. 20); or of a judgment creditor who has obtained a garnishee order nisi (*National United Investment Corporation*, [1901] 1 Ch. 950); or the right of retainer possessed by an executor (*Lee v. Nuttall*, [1879] 12 Ch. D. 61).

⁴ *Westbourne Grove Drapery Co.*, [1877] 5 Ch. D. 248.

⁵ *Gorringe v. Irwell Rubber Works*, [1887] 34 Ch. D. 128.

so far as the Companies Consolidation Act, by Section 210, expressly introduces them.¹ Moreover, a contributory who has paid his calls is not postponed in respect of money owing to him by the company as a partner would be in bankruptcy.² The Rule which prevents a fully secured creditor from presenting a petition in bankruptcy while retaining his security does not prevent a creditor in similar cases from presenting a petition for winding up the debtor company.³ The main effect of the introduction of the Bankruptcy Rules in England and Ireland has been (1) To exclude from proof unliquidated damages for tort, and (2) To prevent a secured creditor from proving for the full amount of his debt and subsequently realising his security.

For the purpose of determining which provisions are to apply, Section 207, importing the Bankruptcy Rules, "must be treated as applicable to any company in liquidation until it is shown that the assets are sufficient for payment of the debts in full."⁴ That is to say, a company in liquidation will be deemed to be insolvent and subject to the Bankruptcy Rules until it is shown that it is solvent as regards its creditors.

The debts provable in the winding up of an insolvent company are therefore governed by Section 30 of The Bankruptcy Act, 1914, which contains the following provisions:—

- (1) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust shall not be provable in bankruptcy.
- (2) A person having notice of any act of bankruptcy⁵ available against the debtor shall not prove under the order for any debt or liability contracted by the debtor subsequently to the date of his so having notice.
- (3) Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge, by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy.
- (8) "Liability" shall, for the purposes of this Act, include any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking,

¹ *Re Maggi, Winehouse v. Winehouse*, [1882] 20 Ch. D. 545; *Withernsea Brick Works*, [1891] 16 Ch. D. 337.

² *Re West of England Bank, ex parte Brown*, [1879] 12 Ch. D. 823.

³ *Moor v. Anglo-Italian Bank*, [1879] 10 Ch. D. 681.

⁴ *Milan Tramways Co.*, [1884] 25 Ch. D. 691.

⁵ Probably the equivalent of this, in the case of a company, is the presentation of a petition or the giving notice of a resolution to wind up.

whether the breach does or does not occur, or is or is not likely to occur or capable of occurring before the discharge of the debtor, and, generally, it shall include any express or implied engagement, agreement, or undertaking to pay or capable of resulting in the payment of money or money's worth, whether the payment is as respects amount fixed or unliquidated, as respects time present or future, certain or dependent on any one contingency or on two or more contingencies, as to mode of valuation capable of being ascertained by fixed rules or as matter of opinion.

Under the Act of 1848 it was held that a creditor might prove in respect of an equitable debt,¹ and under the Act of 1862, which was the same as the present Act, that an assignee can prove for the full amount, although he bought it for less.²

Future and contingent debts being provable, a person holding shares as trustee for the company can prove in respect of his liability for future calls,³ and persons may prove in respect of any right of indemnity against a future liability,⁴ or sureties may prove in the winding up of the principal debtor, or of a co-surety, even before themselves making payment of the debt.⁵

Under Section 30, Sub-section 4, of The Bankruptcy Act, 1914, the amount to be allowed in respect of a contingent debt is to be estimated; but if a contingent debt becomes ascertained during the winding up the whole amount is provable, as, before The Assurance Companies Act, 1909, in the case of a fire occurring damaging property insured by the company,⁶ or the death of a person happening on which a sum of money is payable,⁷ but any dividend already paid will not be disturbed. The Assurance Companies Act, 1909, however, contains express provisions for valuing the liability under policies, and these vary the general rule for Fire and Employers' Liability Policies; the measure of proof for claims which had not emerged at the time of the winding up is the proportion of the premium which has not expired.⁸

Though unliquidated damages in tort cannot be proved, if the claimant has a right alternatively in tort or in contract, as in the case of an action for damages against a public carrier or against

¹ *Terrell v. Hutton*, [1809] 4 H. L. C. 1091.

² *Humber Iron Works and Shipbuilding Co.*, [1869] 8 Eq. 122.

³ *Ex parte Oriental Commercial Bank*, [1868] 3 Ch. 791.

⁴ *Hardy v. Fothergill*, [1880] 13 App. Ca. 351; *Hughes's Claim*, [1872] 13 Eq. 623.

⁵ *Re Paine, ex parte Read*, [1897] 1 Q. B. 122, *Wolmershausen v. Gullick*, [1893] 2 Ch. 514.

⁶ *Macfarlane's Claim*, [1881] 17 Ch. D. 337; *Great Britain Mutual Society*, [1892] 20 Ch. D. 351.

⁷ *Hill v. Bridges*, [1881] 17 Ch. D. 342.

⁸ *Law Car and General Insurance Co.*, [1913] 2 Ch. 103.

bailles after determination of the bailment, he may elect to rest his claim on the contract and prove in the winding up¹; but if he has made his election, and has sued in tort and failed, he cannot prove on the contract.²

If the damages in tort have been liquidated by agreement or by judgment obtained they may be proved³; but in the latter case it seems only if the judgment is actually signed before the commencement of the winding up.⁴ A creditor who had not obtained judgment until after the commencement of a voluntary winding up, and whose claim to prove in the voluntary winding up consequently failed, has been allowed, upon the subsequent discovery of facts justifying a winding up order, to present a petition for the compulsory winding up of the company, under which his debt could be proved.⁵

Debts which are barred by the Statute of Limitations at the date of the winding-up must not be paid,⁶ but the winding-up order stops the running in the company's favour of the Statute of Limitations, and debts which were not barred at the date of the winding-up order may be proved after the time when but for the order they would be barred.⁷ The winding-up order also stops the running of the period after which a solicitor's bill ceases to be taxable at the instance of the liquidator,⁸ so that if less than twelve months had then elapsed the liquidator may obtain taxation at any time, whether the liquidation is voluntary or compulsory.⁹ And even where the twelve months have expired before the commencement of the winding up it is still open to the liquidator to dispute the amount of a solicitor's bill, and in such case the Court will, under its inherent jurisdiction, refer the matter to the taxing master to decide upon the propriety of the charges, a course which is sometimes called "moderating" the bill, and differs from taxation in that the costs of the reference to the taxing master are usually

¹ *Johnson v. Spiller*, [1780] Doug. 108; *Parker v. Norton*, [1795] 6 T. R. 695; *Watson v. Holliday*, [1882] 20 Ch. D. 780.

² *Ex parte Baum, re Edwards*, [1874] L. R. 9 Ch. 673.

³ *Ex parte Mumford*, [1808] 15 Ves. 280.

⁴ *Ex parte Newman, re Brooke*, [1876] 3 Ch. D. 401; *ex parte Muirhead*, [1876] 2 Ch. D. 22; *re Giles, ex parte Stone*, [1889] 6 Mor. 135.

⁵ *Inecto, Limited, in re*, [1922] 38 T. L. R. 707.

⁶ *Fleetwood & District Electric Light Syndicate*, [1915] 1 Ch. 486.

⁷ *Joint Stock Discount Co.'s Claim*, [1872] 7 Ch. 646; *Wryghte's Case*, [1852] 5 De G. & Sm. 244.

⁸ *Ex parte Quilter*, [1851] 4 De G. & Sm. 183; *re Marseilles Extension Railway Co. ex parte Evans*, [1871] 11 Eq. 151; *re Foss, Bilborough & Co.*, [1912] 2 Ch. 161.

⁹ *Ex parte Evans*, [1871] 11 Eq. 151; *re Foss, Bilborough & Co.*, [1912] 2 Ch. 161.

added to the amount for which proof is allowed, irrespective of whether or not one sixth of the bill is taxed off.¹

Where, for the purpose of arriving at the correct amount of a proof, it is necessary to convert a claim from foreign into English currency, the date to be taken is, in the case of damages for breach of contract, the date of the breach,² and in the case of a debt, the date when it became due.³

The liability for calls in another company is a provable debt in the case of a contributory company,⁴ but the proof will not make the shares fully paid for the purpose of participating in surplus assets, unless the full amount is in fact paid.⁵

Only one proof is admissible against a company, even though there be separate contracts creating or securing the debt,⁶ but if a debt is payable by two companies the creditor can prove against each, and receive dividends from each until he has received the whole principal and interest to the date of payment.⁷

The holder of a bill of exchange is entitled to prove his debt in the bankruptcies or liquidations of all the prior parties to the bill, provided he do not receive in the whole more than twenty shillings in the pound.⁸ But if before he prove he have received a part of his claim, or a dividend has been declared under another winding up or bankruptcy, he can only prove for the balance of the debt,⁹ and this is so also where the bill is given as a guarantee and the principal debtor has paid part of the debt.¹⁰ But this rule only applies in the case of negotiable instruments.

Claims arising out of contracts which are *ultra vires* cannot be proved against the company,¹¹ nor the claims of solicitor¹² or brokers¹³ in respect of services rendered in connection with

¹ *Re Park*, [1888] 41 Ch. D. 320, *re Foss*, *Bilborough & Co.*, [1912] 2 Ch. 161; *re Palace Restaurants*, [1914] 1 Ch. 402.

² *British American Continental Bank, in re, Goldzieher and Penso's Claim.*, [1922] 2 Ch. 575.

³ *British American Continental Bank, in re, Credit General Liegeois' Claim.*, [1922] 2 Ch. 589.

⁴ *Re Mercantile Mutual Marine Assurance*, [1884] 26 Ch. D. 415; *re Hallett, ex parte National Insurance Corporation*, [1894] 1 Mans. 380.

⁵ *Re West Coast Gold Fields; ex parte Rowe*, [1906] 1 Ch. 1.

⁶ *Re Oriental Commercial Bank*, [1872] 7 Ch. 99.

⁷ *Warrant Finance Co.*, [1870] 5 Ch. 86; *re Ligomel Spinning Co.*, [1900] 1 Ir. R. 324.

⁸ *Ex parte Taylor, re Houghton*, [1857] 26 L. J. Bank. 58; *ex parte Wildman*, [1885] 1 Atk. 110; *ex parte Cama*, [1874] 9 Ch. 686.

⁹ *Cooper v. Pepys*, [1741] 1 Atk. 107, and cases cited in previous note.

¹⁰ *Ex parte Reader*, [1818] Buck. 381.

¹¹ *Great North-West Railway v. Charlebois*, [1899] App. Ca. 114.

¹² *Howard v. Dollman*, [1863] 1 H. & M. 433.

¹³ *Zulueta's Claim*, [1870] 5 Ch. 444.

transactions which were known by them to be *ultra vires*. No proof can be allowed for a pension earned in a business which is *ultra vires*, or for a pension which is paid voluntarily by the company.¹ Money borrowed without authority, but used to pay debts properly incurred, may be the subject of proof to the extent to which it was so used.²

A debt founded on an illegal consideration cannot be proved,³ nor a debt arising out of an illegal contract for the purpose of trading with an alien enemy.⁴ But the debt of an alien enemy incurred before the outbreak of war may be entered, and after peace is established he will be entitled to claim.⁵

If a company has not become entitled to commence business, no claim can be established against it for goods supplied or otherwise.⁶

A lessor, although not entitled to a dividend on his claim until something becomes payable to him, nor to have anything impounded to meet his possible claim,⁷ may have his claim entered, and prevent the dissolution of the company or the distribution of its assets among contributories⁸ unless provision is made for the rent. If the liquidation continues, the proof must be renewed from time to time as the rent becomes due.⁹ As to a lessor enforcing his claim by distress or re-entry see page 547, *supra*.

The liquidation does not entitle the liquidator to disclaim a lease in the manner a trustee in bankruptcy can do,¹⁰ nor is the term determined unless an express condition is contained in the lease to that effect, in which case it operates even though the company is solvent and the winding up is with a view to reconstruction.¹¹ If the liquidator is willing to make and the lessor to accept a surrender of the lease, it may properly be made a term

¹ Birkbeck Permanent Benefit Building Society, [1913] W. N. 57.

² C&Yk and Youghal Railway Co., [1869] 4 Ch. 748; and see page 388, *supra*.

³ *Ex parte* Dyster, [1815] 1 Meriv. 155; *ex parte* Bell, [1813] 1 M. & S. 761; *ex parte* Chavasse, [1865] 31 L. J. Bank. 17.

⁴ *Ex parte* Schmaling, [1816] Buck 93.

⁵ *Ex parte* Bousmaker, [1806] 13 Ves. 71. An alien enemy cannot be heard in support of any proceeding in the winding up. See *re* Wilson & Wilson, *ex parte* Mann, [1915] 81 L. J. K. B. 1893.

⁶ Otto Electrical Co., [1906] 2 Ch. 390.

⁷ Westbourne Grove Drapery Co., [1877] 5 Ch. D. 248; *Horsley's Claim*, [1808] 5 Eq. 561; *ex parte* Lord Elphinstone, [1870] 10 Eq. 412.

⁸ *Oppenheimer v. British and Foreign Bank*, [1877] 6 Ch. D. 744; *Lord Elphinstone v. Monkland Iron and Coal Co.*, [1886] 11 App. Ca. 332, where the order declared that the liquidators were bound to set aside the surplus assets of the company, or so much thereof as might be necessary to make due provision for the liabilities to the landlord under the lease.

⁹ *Re* New Oriental Bank Corporation, [1895] 1 Ch. 753.

¹⁰ *Westbourne Grove Drapery Co.*, [1877] 5 Ch. D. 248.

¹¹ *Horsley Estate, Limited, v. Steiger*, [1899] 2 Q. B. 70; *Fryer v. Ewart*, [1902] A. C. 187.

of the bargain that the lessor shall be entitled to prove for the loss he sustains, which would be measured by the difference between the rent reserved by the lease and the rent he can obtain at the time of surrender.¹ Without such a bargain the surrender will extinguish future claims; but he cannot have both damages and rent, or rent and possession: therefore if the lease is not determined the lessor's proof can only be for rent actually due.²

A liquidator is bound by a covenant not to assign without consent of the lessor, his position differing from that of a trustee in bankruptcy³; but if the lessee company has a right to assign the lease with the consent of the lessor, subject to a provision that such consent shall not be unreasonably withheld, the liquidator can insist upon consent being granted in a reconstruction where the purchasing company is a responsible party, and if the consent is withheld may assign without consent.⁴

Where debts bear interest, such interest is provable, but in the case of an insolvent company only to the time of the winding up,⁵ whether the winding up be compulsory or voluntary.⁶ If it ultimately prove that there is a surplus, then the interest is payable out of such surplus to the date of repayment. A dividend paid in respect of principal and interest is first to be attributed to the interest.⁷ The interest may be payable on an implied contract evidenced by the course of dealing between the company and the creditor.⁸

As to debts not bearing interest by agreement, Rule 97 declares that on any debt or sum certain, payable at a certain time or otherwise, whereon interest is not reserved or agreed for, and which is overdue at the time of the winding up, the creditor may prove for interest at not more than four per cent. to the date of the commencement of the winding up from the time when the debt was payable, if payable by virtue of a written instrument at a certain time, or, if payable otherwise, from the time when a demand in writing was made giving notice that interest would be claimed from the date of demand until payment, thus following 3 & 4 Will. IV., Ch. 42.

¹ *Re Panther Lead Co.*, [1896] 1 Ch. 978.

² *Re New Oriental Bank Corporation*, [1895] 1 Ch. 753.

³ *Farrow's Bank, Limited*, [1921] 2 Ch. 164.

⁴ *Ideal Film Renting Co. v. Nielsen*, [1921] 1 Ch. 575.

⁵ *Warrant Finance Co.'s Case, re Humber Iron Works and Shipbuilding Co.* [1899] 4 Ch. 613; *Ebbw Vale Co.*, [1870] 5 Ch. 112; *W. W. Duncan & Co.*, [1905] 1 Ch. 307.

⁶ *Thomas Salt & Co.*, [1908] 98 L. T. 598.

⁷ *Warrant Finance Co. No. 2*, [1870] 10 Eq. 11.

⁸ *Re W. W. Duncan & Co.*, [1905] 1 Ch. 307.

This, by implication, negatives any right to interest after the winding up has commenced, and appears to be a valid rule, which Rule 26 of 1862, giving interest on all debts from the date of the order to wind up, was not.¹

As regards the costs of litigation by or against the company prior to the winding up, the rule was that a successful defendant could prove for his costs, whether the action were founded on tort or contract, if the verdict was obtained or judgment pronounced before the winding up,² but a successful plaintiff could only prove if judgment were signed or if the debt were one which could itself be proved.³ But in *re British Goldfields of West Africa*⁴ the Court of Appeal allowed persons who had applied to have their names removed from the Register on the ground of misrepresentation, and whose claim, although never adjudicated upon by the Court, was admitted to be good, to prove for the costs incurred prior to the winding up.

The Court can go behind and reopen a judgment obtained before the liquidation if there was no consideration or a bad consideration for the debt, particularly if the judgment was obtained by consent or by default.⁵ It can equally examine the consideration for which a mortgage was given, and if not good can set the mortgage aside.⁶

Although a liquidator has made a payment and taken a receipt purporting to be "in full discharge of the claim," the creditor will not be precluded from claiming and recovering any further amount due (*e.g.* interest), unless there has been a *bonâ fide* compromise of a disputed claim.⁷ A foreign creditor seeking to prove may be ordered to give security for costs.⁸

Set-Off.

In the case of an insolvent company the Bankruptcy rule as to mutual credit and set-off applies. This is a wider right than that given by the Common Law rule of Set-Off, and under it

¹ *Hatfield Cask Co.*, [1863] 2 N. R. 502; *Herefordshire Banking Co.*, [1867] 4 Eq. 250; *East of England Banking Co.*, [1869] 4 Ch. 11.

² *Ex parte Peacock, re Duffield*, [1873] L. R. 8 Ch. 682; *ex parte Bluck*, [1887] 57 L. T. 419. *ex parte Newman, re Brooke*, [1876] 3 Ch. D. 404.

³ See cases in last preceding note, and *Vint v. Hudspeth*, [1885] 30 Ch. D. 24.

⁴ [1899] 2 Ch. 7.

⁵ *Great North-West Railway v. Charlebois*, [1899] App. Ca. 114 (a consent judgment obtained in respect of an *ultra vires* contract); *ex parte Butterfill, re Dingle*, [1811] 1 Rose 192; *ex parte Prescott*, [1840] 1 M. D. & D. 190; *ex parte Kibble, re Onslow*, [1879] 10 Ch. D. 373 (judgment by default); *ex parte Banner, re Blythe*, [1881] 17 Ch. D. 480 (a compromise); *ex parte Lennox*, [1886] 16 Q. B. D. 315 (a judgment by consent); *re Deerpurth, ex parte Seaton*, [1891] 8 Mor. 97 (a gambling debt which had been assigned).

⁶ *Re Van Laun, ex parte Chatterton*, [1907] 2 K. B. 23.

⁷ *Re W. W. Duncan & Co.*, [1905] 1 Ch. 307.

⁸ *Pretoria Pietersburg Railway Co.*, [1904] 2 Ch. 350.

a claim for unliquidated damages for breach of contract can be set off against a debt.¹ Indeed all claims provable in the winding up may be the subject of set-off, provided that there is mutuality²; so that damages for breaches of obligation arising out of a contract, such as fraudulent misrepresentation on a sale, may be set off, as well as damages for the actual breach of the contract³; nor does it make any difference that the claims sought to be set off are of a different nature, or that one is secured and the other unsecured.⁴ But each claim must result in a liability to pay money; a claim to the return of goods cannot be set off against a money debt.⁵

There are conflicting views as to whether the sum at which a policy of insurance current at the time of the liquidation is valued for the purposes of proof can be set off by the holder of the policy against a debt due from him to the company.⁶

There must be mutuality: that is to say, a joint debt cannot be set off against a several debt⁷; so that even where a liquidator has proved against the separate estates of the two partners in a firm he cannot set off these separate claims against the right of the firm to receive a dividend on shares held by the firm⁸; money held for a specific purpose or on a trust cannot be set off against a debt,⁹ and money due to an executor as executor cannot be set off against money due from him personally¹⁰; and a debt to the liquidator arising in the liquidation cannot be set off against a debt due from the company before winding up.¹¹ A creditor holding security without a power of sale, exerciseable before the liquidation, cannot set off the surplus realised from the security against other debts due to him¹²; but if by consent of the company he gets a right to sell before the liquidation he can then retain the surplus against debts not the subject of the security.¹³ So where

¹ *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.*, [1884] 9 App. Ca. 434.

² *Booth v. Hutchinson*, [1873] 15 Eq. 311, *re* Mid-Kent Fruit Factory, [1890] 1 Ch. 567; *Palmer v. Day*, [1895] 2 Q. B. 618.

³ *Pent v. Jones*, [1881] 7 Q. B. D. 147; *Jack v. Kipping*, [1882] 9 Q. B. D. 113.

⁴ *Ex parte Law*, [1846] De Gex 378; *ex parte Barnett, re Devezze*, [1874] 9 Ch. 293; *McKinnon v. Armstrong*, [1877] 2 App. Ca. 531.

⁵ *Eherle's Hotels and Restaurant Co. v. Jonas*, [1887] 18 Q. B. D. 459.

⁶ *Cf. ex parte Price*, [1875] 10 Ch. 648; *Paddy v. Clutton*, [1920] 2 Ch. 554; and *in re* National Benefit Assurance Co., [1924] 2 Ch. 330; and see page 495, *supra*, note 2.

⁷ *Ex parte Ross*, [1817] Buck 125; *Stanforth v. Fellowes*, [1814] 1 Marsh. 181; *ex parte* Towgood, [1805] 11 Ves. 517.

⁸ *Kent County Gas Company*, [1913] 1 Ch. 92.

⁹ *Re* Mid-Kent Fruit Factory, [1890] 1 Ch. 567; *re* Pollitt, *ex parte* Minor, [1893] 1 Q. B. 455.

¹⁰ *Bishop v. Church*, [1748] 3 Atk. 691.

¹¹ *Ince Hall Rolling Mills Co. v. Douglas Forge Co.*, [1882] 8 Q. B. D. 179; *Alloway v. Steere*, [1883] 10 Q. B. D. 22; *Sankey Brook Coal Co. v. Marsh*, [1871] L. R. 6 Ex. 185, explained in 9 Q. B. 660.

¹² *Young v. Bank of Bengal*, [1836] 1 Moo. P. C. 150.

¹³ *Astley v. Gurney*, [1869] 4 C. P. 714.

a secured creditor has realised his security and has a balance in hand at the time of the liquidation he may set this balance off against an unsecured debt due to him from the company.¹

But the real right to a debt will be taken into account, and it will suffice if the debts are in equity in the same right²: e.g. where debentures are assigned to a trustee the debt of the *cestui que trust* can be set off against the debenture.³

Where the holder of fully paid shares in a company owed the company a large sum of money and died insolvent, after which date the company went into voluntary liquidation and made a return of capital to its shareholders, it was held that there was no set-off nor any right to withhold payment of the return of capital to a greater extent than the dividend declared in the insolvent estate, for at the time of the insolvency there was no debt due from the company.⁴

Primâ facie, if a debt be assigned, the assignee takes subject to all equities existing between the debtor and the creditor at the time of the assignment: and, accordingly, upon proof being tendered by the assignee of a debt, the liquidator can set off any claims he had against the assignor at the time of the assignment, but not those arising subsequently, unless such claims arise out of the same contract from which the debt assigned arose, and are intimately connected with it.⁵ But if the company have invited persons to treat a debt as assignable free from equities—e.g. by declaring that a debenture will be paid to bearer or without regard to equities—it will be precluded from setting up any right it may have against the original or any intermediate creditor,⁶ unless the assignee is merely a trustee for the assignor.⁷

These rules as to Set-Off do not apply to calls payable in the liquidation (see Section 165, Sub-section 2), and a contributory cannot set off against such calls debts due from the company to him.⁸ He must pay his calls in full and then prove for his debt,

¹ *Re* H. E. Thorne & Son, Limited, [1914] W. N. 336.

² *Bailey v. Finch*, [1872] L. R. 7 Q. B. 34; *Bailey v. Johnson*, [1872] L. R. 7 Ex. 263.

³ *Brown and Gregory, Limited*, [1904] 1 Ch. 627, 2 Ch. 448.

⁴ *Re* Peruvian Railway Construction Co., [1915] 2 Ch. 442.

⁵ *Government of Newfoundland v. Newfoundland Railway Co.*, [1888] 13 App. Ca. 190; *Mangles v. Dixon*, [1868] 3 H. L. C. 702; *Athenum Life Assurance Society*, [1850] 3 De G. & J. 294; *Financial Corporation's Claim*, [1868] 3 Ch. 355.

⁶ *Farmer v. Goy & Co.*, [1900] 2 Ch. 149; *Blakeley Ordnance Co.*, [1898] 3 Ch. 164, *Goodwin v. Roberts*, [1876] 1 App. Ca. 476; *ex parte Asiatic Banking Corporation*, [1888] 3 Ch. 391.

⁷ *Brown and Gregory, Limited*, [1904] 1 Ch. 527, 2 Ch. 488.

⁸ Even if Set-Off has been pleaded in litigation prior to the winding up, this will not suffice unless judgment has been obtained (*Hiram Maxim Lamp Co.*, [1903] 1 Ch. 70).

and will receive dividends when declared,¹ nor can this rule be varied even by special agreement,² and the same rule applies in a voluntary liquidation.³ It follows that any arrangement by which a set-off of calls against a debt is effected just before liquidation is liable to be set aside as a fraudulent preference under Section 210, though a similar case could not arise in bankruptcy.⁴ Even where the directors had agreed that any payment made under a guarantee should be treated as a payment in advance of calls, the shareholder was not allowed to set off a payment made on the guarantee after liquidation against calls made by the liquidator.⁵ But if the contributory is also bankrupt the two liabilities are set off upon a claim being made by the company in the bankruptcy of the contributory, and only the balance is provable.⁶ It has generally been supposed that the last-mentioned rule is to be followed if the trustee in bankruptcy makes a claim in the liquidation, and this was held to be so under the Bankruptcy Act of 1849⁷; but Section 38 of The Bankruptcy Act, 1883, and Section 31 of The Bankruptcy Act, 1914, are differently worded, and appear to apply only to cases where proof is made in the bankruptcy of the contributory and the matter requires reconsideration. But if an insolvent company is a creditor of and also a contributory liable for calls in another insolvent company, there is no Set-Off, and the former company is not entitled to dividends until it has paid all calls made upon it.⁸

But the dividend it will be entitled to receive must not be ignored, and the method of arriving at whether a creditor who is also a debtor is to be paid anything is as follows: Ascertain the total assets of the company in liquidation, including the amount due from the creditor in question, and the total liabilities of the company, including the amount owing to the creditor, and from these find the dividend which could be paid assuming that both the claim and the liability of the creditor are taken at their face value. If the dividend on the creditor's claim exceeds the amount due from him he will be paid this excess; otherwise

¹ *Grissell's Case*, [1866] 1 Ch. 528 (the introduction of the Bankruptcy Rules does not affect this case); *Gill's Case*, [1879] 12 Ch. D. 755, *ex parte Brown*, [1879] 12 Ch. D. 823; *Auriferous Properties No. 1*, [1898] 1 Ch. 691. For the rule if the contributory is bankrupt or is an insolvent company see *infra*.

² *Black & Co.'s Case*, [1873] 8 Ch. 254.

³ *Whitehouse & Co.*, [1878] 9 Ch. D. 595; *Black & Co.'s Case*, [1873] 8 Ch. 252.

⁴ *Kent's Case*, [1889] 39 Ch. D. 259; *Washington Diamond Mining Co.*, [1893] 3 Ch. 95.

⁵ *Law Car and General Insurance Corporation*, [1912] 1 Ch. 405.

⁶ *Re Duckworth*, [1867] 2 Ch. 576; *Carrall and Haggard's Claim*, [1869] 4 Ch. 174.

⁷ *Ex parte Strang*, [1870] 5 Ch. 402.

⁸ *Auriferous Properties No. 1*, [1898] 1 Ch. 691; *Auriferous Properties No. 2*, [1898] 2 Ch. 428.

he will receive nothing and the assets in hand will be distributed among the other creditors.¹ So where two companies were in liquidation and each owed to the other a large sum of money, and it appeared that when the principle was applied that neither could receive a dividend without satisfying what was owing from it to the other company, there would be no cash dividend payable in either case, the liquidator of each company was authorised to distribute the cash in hand among the other creditors without reserving anything to meet the claim of the debtor company which would only emerge if it paid in full what it owed.²

A director or officer of the company against whom damages for misfeasance are recovered under Section 215 cannot set off against such damages any debt due from the company to him,³ nor can damages recovered from a promoter for misfeasance be set off by him against an amount due on a debenture of the company. The misfeasant cannot receive anything until he has paid, either actually or in account, all that is due from him.¹

Secured Creditors.

In the case of an insolvent company a secured creditor has four courses open to him (Bankruptcy Act, 1914, Schedule II., Rules 10 to 18):—

- (1) He may assess the value of his security and receive dividends on the balance.
- (2) He may realise his security and prove for the balance.
- (3) He may rely on his security and not prove at all.
- (4) He may surrender his security and prove for his whole debt.

If the creditor adopt the first course the liquidator may redeem the security by paying to the creditor the amount at which it has been assessed, or may require the property comprised in the security to be sold or realised. The creditor may, by writing, require the liquidator to elect which course he will pursue, and if the liquidator does not within six months signify in writing his election, he will no longer be entitled to exercise the power, and the liquidator's equity of redemption or other interest in the property will vest in the creditor.

A creditor who has valued his security may, at his own cost, amend his valuation and proof on showing that the valuation and

¹ Leeds and Hanley Theatres of Varieties, [1904] 2 Ch. 45, where the manner of working out cross claims which are not set off is shown.

² National Live Stock Company v. National General Insurance Company, [1917] 1 Ch. 628.

³ Carriage Co-operative Supply Association, [1884] 27 Ch. D. 322; *ex parte Pelly*, [1882] 21 Ch. D. 492; *Flitcroft's Case*, [1882] 21 Ch. D. 519.

proof were made *bonâ fide* on a mistaken estimate, or that the security has diminished or increased in value since its valuation. If he has meanwhile received a dividend in excess of that to which he is entitled on the new valuation, he must repay the excess; and if he has received too little he is entitled to the balance, but may not disturb any dividend already declared.

If after being valued the security is realised, the net amount realised will be treated as an amended valuation made by the creditor.

The securities above referred to are securities over the property of the company, and do not include securities over the property of third parties, or guarantees given by directors or others.¹

In the case of a company the securities are most usually debentures, but the rule applies to "any mortgage, charge, or lien,"² and may be such as is given directly by contract, as a mortgage or mortgage debenture; or impliedly by contract, as a vendor's lien for unpaid purchase money, a maritime lien,³ a solicitor's, banker's, or broker's lien⁴; and in the case of a company includes a security obtained by execution or garnishee order, the rule in bankruptcy avoiding executions where the sheriff has notice of bankruptcy within fourteen days not applying.⁵ But an order appointing a receiver, who does not take possession before the winding up, does not constitute a security.⁶ A company's lien on the shares⁷ in its capital held by the debtor is a security which has to be brought into account in the bankruptcy or liquidation of the debtor.⁷

As to a solicitor's lien see page 344, *supra*.

If a defendant pays money into court with a denial of liability or to abide the event, or as a condition of obtaining leave to defend,⁸ and becomes bankrupt, the plaintiff is a secured creditor to the amount paid in.⁹

¹ Bankruptcy Act, 1914, Section 167, definition of "secured creditor"; *ex parte* West Riding Union Banking Co., *re* Turner, [1882] 19 Ch. D. 105. 4

² Compare Bankruptcy Act, 1883, Section 168.

³ Australian Steam Navigation Co., [1875] 20 Eq. 325; Rio Grande do Sul Steamship Co., [1877] 5 Ch. D. 282.

⁴ *Brandao v. Barnett*, [1846] 12 Cl. & F. 789; *Jones v. Peppercorne*, [1859] 1 Johns. 430, 28 L. J. Ch. 158; *ex parte* Backworth, [1858] 27 L. J. Bank. 5; *re* Capital Fire Insurance Association, [1883] 24 Ch. D. 408.

⁵ *Printing and Numerical Co.*, [1879] 8 Ch. D. 535, *so* far as not overruled by *Withernsea Brick Works Co.*, [1881] 16 Ch. D. 337, which establishes the latter part of the above proposition.

⁶ *Croshaw v. Lyndhurst Ship Co.*, [1897] 2 Ch. 151; *re* Lough Neagh Ship Co., [1896] 1 Ir. R. 29.

⁷ *National Bank of Wales*, [1899] 2 Ch. 629.

⁸ *Re* Ford, [1900] W. N. 124.

⁹ *Ex parte* Banner, *re* Keyworth, [1874] 9 Ch. 370; *re* Gordon, *ex parte* Navalchand, [1898] 4 Mana. 141.

he will receive nothing and the assets in hand will be distributed among the other creditors.¹ So where two companies were in liquidation and each owed to the other a large sum of money, and it appeared that when the principle was applied that neither could receive a dividend without satisfying what was owing from it to the other company, there would be no cash dividend payable in either case, the liquidator of each company was authorised to distribute the cash in hand among the other creditors without reserving anything to meet the claim of the debtor company which would only emerge if it paid in full what it owed.²

A director or officer of the company against whom damages for misfeasance are recovered under Section 215 cannot set off against such damages any debt due from the company to him,³ nor can damages recovered from a promoter for misfeasance be set off by him against an amount due on a debenture of the company. The misfeasant cannot receive anything until he has paid, either actually or in account, all that is due from him.¹

Secured Creditors.

In the case of an insolvent company a secured creditor has four courses open to him (Bankruptcy Act, 1914, Schedule II., Rules 10 to 18):—

- (1) He may assess the value of his security and receive dividends on the balance.
- (2) He may realise his security and prove for the balance.
- (3) He may rely on his security and not prove at all.
- (4) He may surrender his security and prove for his whole debt.

If the creditor adopt the first course the liquidator may redeem the security by paying to the creditor the amount at which it has been assessed, or may require the property comprised in the security to be sold or realised. The creditor may, by writing, require the liquidator to elect which course he will pursue, and if the liquidator does not within six months signify in writing his election, he will no longer be entitled to exercise the power, and the liquidator's equity of redemption or other interest in the property will vest in the creditor.

A creditor who has valued his security may, at his own cost, amend his valuation and proof on showing that the valuation and

¹ Leeds and Hanley Theatres of Varieties, [1904] 2 Ch. 46, where the manner of working out cross claims which are not set off is shown.

² National Live Stock Company v. National General Insurance Company, [1917] 1 Ch. 628.

³ Carriage Co-operative Supply Association, [1884] 27 Ch. D. 322, *ex parte* Pelly, [1882] 21 Ch. D. 492, Fhtcroft's Case, [1882] 21 Ch. D. 519.

proof were made *bond fide* on a mistaken estimate, or that the security has diminished or increased in value since its valuation. If he has meanwhile received a dividend in excess of that to which he is entitled on the new valuation, he must repay the excess; and if he has received too little he is entitled to the balance, but may not disturb any dividend already declared.

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¹ Bankruptcy Act, 1914, Section 167, definition of "secured creditor"; *ex parte* West Riding Union Banking Co., *re* Turner, [1882] 19 Ch. D. 105.

² Compare Bankruptcy Act, 1883, Section 108.

³ Australian Steam Navigation Co., [1875] 20 Eq. 325; Rio Grande do Sul Steamship Co., [1877] 5 Ch. D. 282.

⁴ Brandao v. Barnett, [1840] 12 Cl. & F. 789; Jones v. Peppercorne, [1859] 1 Johns. 430, 28 L. J. Ch. 159; *ex parte* Backworth, [1858] 27 L. J. Bank. 5; *re* Capital Fire Insurance Association, [1893] 24 Ch. D. 408.

⁵ Printing and Numerical Co., [1879] 8 Ch. D. 535, so far as not overruled by Withernsea Brick Works Co., [1881] 16 Ch. D. 337, which establishes the latter part of the above proposition.

⁶ Croshaw v. Lyndhurst Ship Co., [1897] 2 Ch. 154; *re* Lough Neagh Ship Co., [1896] 1 Ir. R. 29.

⁷ National Bank of Wales, [1899] 2 Ch. 629.

⁸ *Re* Ford, [1900] W. N. 124.

⁹ *Ex parte* Banner, *re* Keyworth, [1874] 9 Ch. 379; *re* Gordon, *ex parte* Navalchand, [1898] 4 Mans. 141.

A security can only be redeemed on payment of principal and interest to time of payment, and so a secured creditor may get interest out of his security after the winding up,¹ but if the security is insufficient he can only prove for interest after liquidation if the company is solvent (see page 555, *supra*).

It must be borne in mind that in a compulsory liquidation if a secured creditor has voted at the first meeting of creditors in respect of his whole debt without valuing his security he is deemed to have surrendered his security, unless the Court is satisfied that the omission to value his security has arisen from inadvertence (Winding-Up Rule No. 135; see page 500, *supra*). In such a case the creditor has to come to the Court and satisfy it that the omission to value was due to inadvertence. But this is not enough, for his proof still remains stating that he has no security; and under the Bankruptcy Acts it has been held that while such proof stands he cannot assert his security. He must, therefore, also ask leave to amend his proof, which can be allowed under Section 109 of The Bankruptcy Act, 1914. Before giving leave, however, the Court has first to be satisfied—(A) of the inadvertence²; (B) that the liquidator has not altered his position, relying on the fact that the security is not asserted; and (C) that some good result will follow: *e.g.* that there really is a good security.³ If the applicant fail on any of these points he will not be allowed to amend. In a voluntary liquidation such a vote does not invalidate the security, but the vote must not be counted (see page 529, *supra*).

Proof of Debts.

By Rule 102, which in terms applies to any winding up (*i.e.* whether by the Court, Under Supervision, or Voluntary), the liquidator, unless otherwise ordered by the Court, may on his own account fix a certain day (not less than fourteen days from the date of the notice) on or before which creditors are to prove their debts or claims or be excluded from the benefit of any distribution made before such debts are proved. The notice is to be given by advertisement in such newspaper as the liquidator thinks fit, and by written notice in compulsory liquidations to every creditor mentioned in the statement of affairs, and in any other winding up to the last known address of each person who, to the knowledge of the liquidator, claims to be a creditor. This

¹ Warrant Finance Co. No. 3, [1870] 10 Eq. 11.

² As to what is inadvertence see *re Burr, ex parte Clarke*, [1802] 67 L. T. 232, 465. A mistake as to value will not suffice (*re Piers*, [1898] 1 Q. B. 627).

³ *Re Safety Explosives, Limited*, [1904] 1 Ch. 226 C. A.; *ex parte Huddersfield Banking Co.*, [1892] 2 Ch. 417.

power was first given in the case of voluntary liquidations by the Rules of 1903 and is of great importance.

In a compulsory winding up every creditor must prove his debt at his own cost by sending an affidavit to the Official Receiver or liquidator (Rules 88, 89, and 94). The affidavit must state whether the creditor has any security (Rules 90 to 92).

In voluntary liquidations the liquidator accepts such evidence of debts as he thinks fit, and usually admits debts which he finds entered in the books of the company; but it is his duty to make inquiries if any doubt arises in his mind, and, if necessary, to call for proof of the debt.

Any person failing to prove is not excluded generally, but only from participating in any distribution made before his debt is proved. He can therefore prove at any time before the dissolution of the company, and if any funds remain undistributed can obtain payment out of such funds.¹ It would seem, however, that a distribution among contributories could not, any more than a distribution among creditors, be disturbed to pay debts subsequently proved. The liquidator ought to send express notice to any creditor of whose debt he has any knowledge.²

The liquidator must examine, and in writing admit or reject, the proofs, or require further evidence.

A creditor may within twenty-one days from the rejection, but in a compulsory liquidation not later without leave of the Court, appeal against the rejection in whole or in part of his proof³ (Rule 104). If, however, notice of intention to declare a dividend has been given, naming a date for the lodging of proofs, appeals subsequent to such notice must be within seven days of rejection of the proof, and the liquidator may then make provision for the debt; otherwise he will ignore it in declaring the dividend (Rule 150 [2]). In a voluntary winding up there is no limit of time for applying to the Court to have proof of a debt allowed.

There is no provision in the Act or Rules for withdrawing or amending a proof once made, but an amendment was allowed by the Court in a case of mistake,⁴ and amendments of proofs have been freely allowed in bankruptcy,⁵ where, however, Section 109 of The Bankruptcy Act, 1914, gives the Court power to amend any written process or proceeding under the Act, and it must

¹ Compare *Hicks v. May*, [1880] 13 Ch. D. 236, and *Kit Hill Tunnel*, [1881] 16 Ch. D. 580.

² *Pulsford v. Devenish*, [1903] 2 Ch. 625.

³ The appeal is by summons in chambers (*National Whole-Meal Bread & Co.*, [1892] 2 Ch. 457). It may be allowed with costs (*re Smith*, 1886] 17 Q. B. D. 448).

⁴ *Huddersfield Banking Co.*, [1892] 2 Ch. 417.

⁵ *Ex parte Bagshaw*, [1880] 13 Ch. D. 305; *ex parte Schofield*, [1879] 12 Ch. D. 337, but leave was refused in *Couldery v. Bartrum*, [1882] 19 Ch. D. 394.

not be assumed that Bankruptcy Rules can be imported into a winding up¹ except to the extent provided by Section 207 (see page 549, *supra*).

Where a creditor who has proved subsequently assigns his debt and then withdraws his proof the assignee will be entitled to file a proof in substitution.²

Undue or Fraudulent Preference.

The Bankruptcy Rule as to fraudulent preference is not introduced by Section 207 into the winding up of companies,³ but the main provisions are applied by Section 210, which is as follows:—

- (1) Any conveyance, mortgage, delivery of goods, payment, execution, or other act relating to property which would, if made or done by or against an individual, be deemed in his bankruptcy a fraudulent preference, shall, if made or done by or against a company, be deemed, in the event of its being wound up, a fraudulent preference of its creditors, and be invalid accordingly.
- (2) For the purposes of this section the presentation of a petition for winding up in the case of a winding up by or subject to the supervision of the Court, and a resolution for winding up in the case of a voluntary winding up, shall be deemed to correspond with the act of bankruptcy in the case of an individual.
- (3) Any conveyance or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void to all intents.

There is a further provision regarding floating charges contained in Section 212 (see pages 568 and 569, *infra*).

The section set out above must be interpreted in connection with the Law of Bankruptcy for the time being in force,⁴ and must, therefore, now be read with Section 44 of The Bankruptcy Act, 1914. In fact, to be void the matter or thing complained of must fall within both sections.

The tests of an undue preference under the Bankruptcy Act are—

- (A) That the dealing should be by a person unable to pay his debts as they become due.
- (B) That it should be in favour of a creditor or some person in trust for him.

¹ Pretoria Pietersberg Railway, [1904] 2 Ch. at page 361.

² *Re Globe Trust, Limited*, [1916] W. N. 100.

³ *Re Maggi, Winehouse v. Winehouse*, [1892] 20 Ch. D. 545, *Withernsea Brick Works*, [1881] 16 Ch. D. 337.

⁴ *Liverpool Guarantee Co.*, [1882] 46 L. T. 51, 30 W. R. 378.

- (c) That it should be with the view of giving such creditor a preference over the other creditors.
- (d) That the debtor should be adjudged bankrupt on a bankruptcy petition presented within three months after the date of the dealing, which should be read in case of a company as—That the company should be wound up on a petition presented or under a resolution passed within three months after the date of the dealing.¹

The period of three months is measured in case of a compulsory order from the presentation of the petition, even though there has been a previous voluntary winding up.² If there is a voluntary winding up continued under supervision the date is the presentation of the petition, so that dealings which during the voluntary winding up were invalid may be validated by a subsequent order for compulsory winding up or the continuance of the winding up under supervision. If no order is made by the Court the date is measured from the passing of the extraordinary resolution or confirming of the special resolution for winding up.

The cases in bankruptcy before 1869 turned upon whether the dealing was (A) voluntary or (B) made in contemplation of bankruptcy; but there is no essential difference, for unless the act is voluntary and in contemplation of insolvency it cannot have been with the view of preferring the creditor,³ who but for the insolvency would obtain payment irrespective of the preference given him. The Courts, however, are now bound by and will look only to the wording of the Act.⁴

The essence of a fraudulent preference is that it should be made "with a view to giving such creditor a preference over the other creditors," so that the motive or object is of the first importance, and it must not be inferred that payment by a debtor who is insolvent to his own knowledge is fraudulent if he is continuing to carry on business, and only pays in the ordinary course of business⁵; but if the payment is not in the ordinary course it will be held to be fraudulent.⁶ Further, if the payment is made under pressure of the fear of legal proceedings, whether civil or criminal, or with a view of repairing a wrong done (*e.g.* making good moneys

¹ *Re Washington Diamond Co.*, [1893] 3 Ch. at page 100. Section 210 refers to the date of the act of bankruptcy, but under the present Bankruptcy Law the question is determined by the date of the petition, and not by the date of the act of bankruptcy on which the order is founded.

² *Russell Hunting Record Co.*, [1910] 2 Ch. 78.

³ See *Sharp v. Jackson*, [1899] App. Ca. 419.

⁴ *Ex parte Griffith, re Wilcoxon*, [1883] 23 Ch. D. 69.

⁵ *Re Clay & Sons*, [1896] 3 Mans. 31.

⁶ *Re Eaton & Co.*, [1897] 2 Q. B. 16.

misapplied), it will be protected,¹ and the same rule applies in the case of a trustee making good breaches of trust.² The payment will also be unobjectionable if made in pursuance of a precedent contract or engagement,³ or even under the belief that there is a legal obligation to pay,⁴ or if the fund had been specially appropriated to the particular object,⁵ for in all these cases it will be observed the motive is not that of preferring the creditor. So an assignment of an interest in land made in pursuance of an earlier agreement is not a fraudulent preference,⁶ but where a director was entitled under an earlier agreement to have a debenture issued for advances already made, and obtained the debenture shortly before the commencement of the winding up, Buckley, J., held the debenture void on the analogy of certain cases relating to bills of sale given by an insolvent trader.⁷

Again, if the object is not to prefer the creditor, but to benefit some other person (unless such other person is a surety or guarantor for the debt due to the creditor⁸), or to obtain some advantage for the debtor himself,⁹ or to repair an error, as by giving a good security in place of a void one¹⁰, there will be no fraudulent preference. But, on the other hand, to make a payment because the debtor thinks the creditor's case is one of hardship is essentially an undue preference.¹¹

The intention to prefer the particular creditor must in fact be the "substantial, effectual, or dominant" view, but it need not be the sole view in the debtor's mind.¹²

In the same way, if the creditor brought pressure to bear on the debtor to induce him to pay or give security, this pressure (if

¹ *Ex parte Taylor, re Goldsmid*, [1887] 18 Q. B. D. 205; *New, Preece and Garrard's Trustee v. Hunting*, [1897] 2 Q. B. 19, affirmed *sub nom. Sharp v. Jackson*, [1899] App. Ca. 419.

² *Re Lake, ex parte Dyer*, [1901] 1 K. B. 710; *Sharp v. Jackson*, [1899] App. Ca. 419.

³ *Ex parte McKenzie, re Bent*, [1873] 42 L. J. Bank. 25; *ex parte Hodgkin, re Softley*, [1875] 20 Eq. 746.

⁴ *Bills v. Smith*, [1865] 34 L. J. Q. B. 68; *re Vautin, ex parte Saffery*, [1900] 2 Q. B. 325.

⁵ *Toovey v. Milne*, [1819] 2 B. & Ad. 683; *Vacher v. Cocks*, [1817] 1 B. & Ad. 145.

⁶ *Re Davies*, [1921] W. N. 259.

⁷ *Re Jackson and Bassford, Limited*, [1906] 2 Ch. 467; but note that the Bankruptcy cases relied upon depended upon the assignment being an act of bankruptcy and the title of the trustee relating back to the date of such act, which has no analogy in a winding up.

⁸ *Re G. Stanley & Co.*, [1924] W. N. 200. This exception arises under an amendment of the Bankruptcy Law by Section 44 (1) of The Bankruptcy Act, 1914, in consequence of such decisions as *re Mills, ex parte Official Receiver*, [1888] 5 Mor. 55; *re Stenotyper, Limited*, [1901] 1 Ch. 230, in which a payment to a creditor with the intention of relieving a surety or guarantor were held not to be fraudulent preferences.

⁹ *Re Arnott, ex parte Barnard*, [1880] 6 Mor. 215.

¹⁰ *Re Tweeddale*, [1892] 2 Q. B. 216. Compare *re N. Defries & Co.*, [1904] 1 Ch. 37.

¹¹ *Buckley's Case*, [1899] 2 Ch. 725.

¹² *Ex parte Hill, re Bird*, [1883] 23 Ch. D. 695, *re Fletcher, ex parte Suffolk*, [1892] 9 Mor. 8.

sufficient) will negative the idea that the debtor's view was to give the creditor a preference,¹ for the word "preference" involves the debtor having a free choice.² The question is, however, always one of fact, to be determined by all the circumstances of the case.

It has been said that a director of a company cannot put pressure upon his company so as to avoid the operation of these sections.³

The payment or security must be to a creditor with a view of preferring such creditor, and for this purpose the word "creditor" includes any person who would be entitled to prove in the bankruptcy or winding up: *e.g.* a surety under a contingent liability.⁴

The whole effect of the Companies Acts must be taken into account. Thus, as there is no set-off in a winding up of calls against debts, it will be a fraudulent preference for directors to effect a set-off of their calls just before liquidation,⁵ although a similar case could not arise in bankruptcy. But where directors having guaranteed the company's overdraft made calls, paid up the amount of their own shares, and used the sum received in paying off the bank which had obtained judgment against them personally on their guarantee, there was no fraudulent preference, for the payment was not to themselves, and the object of making it was not to prefer the bank,⁶ and directors who pay a debt guaranteed by themselves are entitled to the full benefit of the security held by the lender over the company's assets.⁷

When there is a fraudulent preference the dealing can only be set aside for the benefit of the general body of creditors, and not for a single creditor or class of creditors, so that if the debenture holders take all the assets a preference will not be set aside for their benefit.⁸

The directors who make payments by way of fraudulent preference are jointly and severally liable to repay the amount paid to the company,⁹ but it may be that upon proof that the creditors preferred are able to repay the amount the directors'

¹ *Butcher v. Stand*, [1875] L. R. 7 H. L. 840, *ex parte* Topham, *re* Walkor, [1873] 8 Ch. 614, *ex parte* Kevan, *re* Crawford, [1874] 9 Ch. 752, *Smith v. Pilgrim*, [1870] 2 Ch. D. 127.

² *Sharp v. Jackson*, [1899] App. Ca. 427.

³ *Gas Light Improvement Co. v. Terrell*, [1870] 10 Eq. 168.

⁴ *Blackpool Motor Car Co.*, [1901] 1 Ch. 77.

⁵ *Washington Diamond Mining Co.*, [1893] 3 Ch. 95; *Kent's Case*, [1888] 3 Ch. 259.

⁶ *Poole's Case*, [1878] 9 Ch. D. 322.

⁷ *Ex parte Gibbs*, [1875] 10 Eq. 312.

⁸ *Willmott v. London Celluloid Co.*, [1886] 31 Ch. D. 425, [1887] 31 Ch. D. 147.

⁹ *Washington Diamond Mining Co.*, [1893] 3 Ch. 95 C. A. But note that this point was not argued, the persons who received the payment being the two directors who made it, and it was therefore a matter of indifference to them on what ground they were ordered to pay.

liability will be reduced, for the loss to the company is only the sum it is unable to recover, together with the costs of recovering the balance.

It having been found that in a number of cases debentures were issued in respect of past debts to directors or their friends after insolvency was known to exist, but were supported by sufficient consideration to escape the effect of the above rules, it is enacted, by Section 212, that where a company is being wound up a floating charge¹ on the undertaking or property of the company created within three months of the commencement of the winding up² shall, unless it is proved that the company immediately after the creation of the charge was solvent,³ be invalid, except to the amount of any cash paid to the company at the time of or subsequently to and in consideration for the charge, together with interest on that amount at the rate of five per centum per annum. For instance, if a person had advanced a thousand pounds to a company without security, and then seeing the company in difficulties wished to obtain security, he could, apart from this section, have arranged that in consideration of an advance of a further hundred pounds he should receive debentures charged on all the company's property for the whole eleven hundred pounds, and under the old law it might well be held that the charge was not given to prefer the creditor, but in consideration of the further loan. But under this section, if the company is wound up within three months of the giving of the debentures, the charge will only be good for a hundred pounds and interest, unless the creditor shows that the company was solvent at the time of its creation. *Bonâ fide* creditors will require to be careful that they get their security "at the time of" making their advances, or they too may be caught by the section. The words "at the time of" cannot be read to mean "at the moment of," but the question will depend on the circumstances of each case. Where on 25th November a director agreed to advance £1000 against a debenture, and upon

¹ As to floating charges see page 228, *supra*.

² Where a company in voluntary winding up is ordered to be wound up by the Court the commencement of the winding up is the date of the presentation of the petition (*Taurine Co.*, [1884] 25 Ch. D. 118). Thus a compulsory order may validate debentures which were void in the voluntary winding up.

³ Insolvency includes "not merely being behind the world if an account were taken, but insolvency to the extent of being unable to pay just debts in the ordinary course of trade and business" (*per* Willes, J., *Saddlers Co.*, [1863] 10 H. L. C. at page 425). Lord McLaren says "a man may be said to be insolvent when upon an exact balance of his capital" (i.e. assets) "and liabilities, it appears that he has not enough in the world to meet all the claims that might be made against him by his creditors. There is another meaning, viz. where the debtor is unable to meet his current liabilities" (*McLay v. McQueen*, 36 Sc. L. R. 372, 1 Fraser 801). Compare the definition in The Sale of Goods Act, 1893, Section 62, Sub-section 3, and see *re Muggeridge*, [1860] 29 L. J. Ch. 288; *Biddlecombe v. Bond*, [1836] 4 A. & E. 332. No account should be taken of the share capital of the company.

it being resolved that a debenture be executed at the next board meeting advanced £350, and on 2nd December a further £350, and received his debenture on 6th December, paying over the balance of £300, it was held that his security was good for the whole £1000.¹ Very little delay will, however, imperil the security.

Where directors had guaranteed the company's overdraft and, being pressed for payment, paid the amount to the company, who paid the bank and agreed to issue debentures to the directors, the transaction was held to fall within the section, and, the company having gone into liquidation, the agreement to issue debentures was held to be invalid.² Where debentures were issued to a bank to secure an existing loan account and a current account and the company went into liquidation within three months, there being then nothing due on the current account, the charge was held to be invalid as regards the loan account, although in the meantime various advances had been made and repaid on the current account.³

The Deeds of Arrangement Act, 1914, does not govern companies, and an assignment by a company for the benefit of creditors does not require registration,⁴ although it may be void under Sub-section (3) of Section 210, cited on page 571, *supra*.

CONTRIBUTORIES AND CALLS.

Settling List of Contributors.

For the purpose of ascertaining the persons who are liable to contribute in the way of paying calls and those who are entitled to participate in the surplus assets the liquidator must settle the list of contributories.

124. The term "contributory" means every person liable to contribute to the assets of a company in the event of its being wound up, and, in all proceedings for determining and in all proceedings prior to the final determination of the persons who are to be deemed contributories, includes any person alleged to be a contributory.⁵

The liquidator,⁶ whether in a voluntary or compulsory winding up, has power to settle the list of contributories; but in a compulsory winding up he cannot rectify the Register without the

¹ *Columbian Fireproofing Co.*, [1910] 2 Ch. 120.

² *Orleans Motor Co.*, [1911] 2 Ch. 41.

³ *Christy v. Hayman, Christy & Lilly, Limited*, [1917] 1 Ch. 283.

⁴ *Delancy v. Merry*, [1901] 1 K. B. 530; *re Riley's, Limited*, [1903] 2 Ch. 590.

⁵ As to the liability to contribute see Section 123 set out at pages 21 and 22, *supra*.

⁶ After the winding-up order is made the Official Receiver may proceed to settle the list before the question whether he is to be liquidator is settled or not (*English Bank of the River Plate*, [1892] 1 Ch. 391).

special leave of the Court (see page 510, *supra*). He must put upon the list every person who is a member at the time of the liquidation, and if a "B" list is prepared (see below) all who have been members within one year before the commencement of the liquidation. Under Sections 126 and 127 the executors or administrators of deceased member, or the trustee of a bankrupt member,¹ must be put on the list in their representative capacity. The heirs and devisees may also be added if necessary (Section 126).

The Court can rectify the Register, either on the occasion of the original settlement of the list of contributories or subsequently (e.g. upon a transfer of shares being made with the sanction of the Court²), and if a member's name should have but has not been removed before the liquidation may direct that it shall be excluded from the list of contributories³ (Sections 32 and 163).

As the power of the liquidator to make calls is on "the contributories for the time being settled on the list of contributories," it is essential to settle this list before any call is made.

The manner of settling the list in a compulsory winding up is prescribed by Rules 77 to 82 (see page 573, *infra*).

In a voluntary liquidation the same procedure may be followed with advantage, but it is not essential to give notice to persons to be settled on the list.⁴

If it is shown that existing members are unable to satisfy the contributions required, the list will be divided into two portions, the "A" List and the "B" List, which between them must contain the names of all the contributories, who are defined by Section 124, from which and Section 123 it will be seen that all present members and all past members who have not ceased to be members for more than a year are contributories. The names of past members who are subject to the contingent liability are placed in the "B" List; the names of present members in the "A" List.

The list of contributories settled by the liquidator in a compulsory winding up, if not appealed against within twenty-one days, is conclusive that the persons named therein are contributories, but the Court may extend the time for appealing (Rule 81). The list in a voluntary winding up is only *prima facie* evidence of the liability of the persons named (Section 186 (vi.)), and any person named may, when proceedings are taken against him for calls, show that he was not properly included in the list.

It does not follow because a person's name is placed upon the list of contributories that he is therefore liable to pay calls. It will often

¹ As to the Trustee in Bankruptcy's right to disclaim see page 438, *supra*.

² *Onward Building Society*, [1891] 2 Q. B. 403.

³ *Nation's Case*, [1866] 3 Eq. 77.

⁴ *Brighton Arcade Co. v. Dowling*, [1868] L. R. 3 C. P. 175, 187.

happen that the fact of his being on that list will entitle him to receive dividends. Every person on the Register of Members at the time a company goes into liquidation is *primâ facie* a "contributory," whether his shares are fully paid or not, for the word is used in the Acts in respect of distributions of assets and adjustments of rights as well as in connection with calls.¹ Where the shares are fully paid the holders of such shares are of course exempt from further calls in respect of them.

In the case of a Company Limited by Guarantee a member could formerly only be put upon the list in respect of the amount of his guarantee²; but it seems that now, under Section 123, Sub-section 3, the amount for which he is liable in respect of capital is also a "contribution." If other sums are due from a member they must be recovered by an action in the ordinary course.³

The liquidator cannot insist on placing a holder of fully paid shares on the list of contributories against his will: *e.g.* with a view to taking proceedings against him under Section 165.⁴

It is the duty of the liquidator in a voluntary liquidation to rectify and in a compulsory winding up to procure the rectification of the Register by placing or asking the Court to place upon it the names of persons who have agreed to take shares and to become members, but have never been placed upon the Register, or who having previously had their names upon the Register have afterwards had them improperly removed, either by an irregular transfer of the shares to some other person, or by an invalid forfeiture or surrender of the shares. If the liquidator in a voluntary winding up believes a person to be liable as a contributory, he should place his name on the list (under Section 186 (v.)), and leave him to take proceedings in order to correct the error if there be any⁵; but in a proper case the liquidator may take out a summons to have it determined whether any class of persons ought to be included in the list of contributories. Such a question should not, however, be included in a summons asking other relief.⁶

When a company has gone into liquidation it is too late for a member to get his name removed on the ground that he was induced to take shares by fraudulent misrepresentation. Unless his action was commenced before the winding up, he will remain liable upon his shares.⁷

¹ Angleson Colliery Co., [1868] 1 Ch. 555.

² Lion Insurance Co. v. Tucker, [1884] 12 Q. B. D. 176.

³ Bard's Case, [1809] 2 Ch. 503; Marlborough Club Co., [1868] 5 Eq. 365; Hodge's Distillery Co., [1871] 6 Ch. 51.

⁴ Marlborough Club Co., [1868] 5 Eq. 365.

⁵ Re Cornwall Brick Co., [1893] W. N. 9.

⁶ Re E. J. Wragg, [1897] 1 Ch. 801.

⁷ Tennent v. Glasgow Bank, [1870] 4 App. Ca. 615; and see pages 140 and 141, *supra*.

A person who has transferred his shares to an infant, or who has, by false representations, procured an irresponsible person to be accepted in his place, or a member who has procured a fraudulent or collusive forfeiture or surrender of his shares, or a forfeiture or surrender which is not within the powers of the directors to be made, will be restored to the Register and held liable.¹ But a purchaser who has procured the transfer to be made to a person of small means as trustee for him,² or even to an infant,³ cannot be put on the list of contributories, for there is no privity between him and the company.

The holders of shares forfeited more than a year before the commencement of the winding up cannot be placed on the list of contributories, even if they remain liable for calls made before the forfeiture,⁴ nor can the company⁵ or the liquidator⁶ under the common form of Articles annul the forfeiture without the consent of the member so as to make him a contributory; but if the forfeiture was within a year of the winding up he may be placed on the "B" List.⁷ An irregular forfeiture or surrender of shares, however, does not become valid by lapse of time.⁸

In the case of transfers, if a transfer has not been completed by registration the transferor remains a member and must be put on the "A" List of Contributories. If the transfer has been completed by registration less than a year before the commencement of the winding up, the transferor should be put on the "B" List, even if the shares have in the meantime been forfeited.⁹

Where shares are fully paid there is no occasion to put past members on the "B" List, for only the liability of the holders is affected thereby.

The liability of the "B" contributories (past members) is limited (A) to the amount remaining unpaid on the shares they previously held, after exhausting all means of obtaining payment from the present holders; and (B) to the amount required to pay the debts contracted while they were members, after taking credit against such debts for the amounts paid out of the assets and calls on present members, the unsecured debts of whatever date

¹ See pages 89 and 206, *supra*.

² *King's Case*, [1871] 6 Ch. 190. See pages 200 to 208, *supra*.

³ *Massey and Griffin's Case*, [1907] 1 Ch. 582; and see page 89, *supra*.

⁴ *Needham's Case*, [1867] 4 Eq. 135; *Ladies' Dress Association v. Fulbrook*, [1900] 2 Q. B. 376.

⁵ *Re Exchange Trust*, [1903] 1 Ch. 711.

⁶ *Dawes's Case*, [1868] 6 Eq. 232.

⁷ *Creyke's Case*, [1870] 5 Ch. 63.

⁸ *Esparto Trading Co.*, [1879] 12 Ch. D. 191; *Bottomley's Case*, [1881] 16 Ch. D. 681; *Bellerby v. Rowland and Marwood's Steamship Co.*, [1902] 2 Ch. 14.

⁹ *Badger and Neill's Case*, [1869] 4 Ch. 266.

ranking equally against such assets and calls.¹ There is no rule that either set of contributions is to be applied rather to one set of debts than the other.²

Neither the Act nor the Rules prescribe the manner of settling the list of contributories in a voluntary winding up, and the liquidator can follow his discretion; but in a compulsory liquidation the Rules are precise (Rules 77 to 82), and detailed forms are given for use (Forms 42 to 49). A provisional list is prepared by the liquidator³ (Form 42), containing the name and address of each contributory and the number of shares or interest in respect of which he is entered in the list. In the case of a deceased or bankrupt member of the company his representatives are entered in the list, but are to be distinguished as being placed there only in a representative capacity (Rule 77). Their liability will only be to contribute so far as the estate of the deceased or bankrupt member will allow. The heirs and devisees may be but need not be entered (Section 126). If default is made by the personal representatives or trustee in bankruptcy in paying, the liquidator may take proceedings for administering the estate or prove in the bankruptcy (Sections 126 and 127).

The liquidator must then fix a time and place for settling the list, and give notice to the persons included of such time and place and of the manner in which they are included (Rules 77 and 78). After hearing any objections that may be urged the liquidator settles the list, acting of course judicially, and must give notice to all persons settled upon it of the fact and the manner in which they are included, also notifying that if any desire to appeal to the Court they must do so by summons within twenty-one days from the date of service of the notice (Rules 79 and 80, Forms 45 and 46). The Rules and Forms do not distinguish between those who are present members placed on the "A" List and those who are past members still contingently liable (see previous page) placed on the "B" List. The latter is only settled if it appear to the Court that the existing members are unable to satisfy the contributions required.⁴

An appeal can be made to the Court against the liquidator's decision, either including or excluding any person, but without the special leave of the Court the application must be made within twenty-one days after service on the applicant of notice that the

¹ Brett's Case and Morris's Case, [1873] 8 Ch. 800.

² Webb v. Whiffin, [1871] L. R. 5 H. L. 711.

³ The Official Receiver, as Provisional Liquidator, can settle the list (English Bank of the River Plate, [1892] 1 Ch. 391).

⁴ McEwen's Case, [1871] 6 Ch. 592; Helbert v. Banner, [1871] L. R. 5 H. L. 28.

list has been settled¹ (Rule 81). If no such application is made within the time allowed the persons placed on the list will not be able to escape the liability for calls, for by Section 166 calls are to be made upon and payment may be ordered by "the contributories for the time being settled on the list," and by Section 168 any order made on a contributory is conclusive evidence that the moneys are due.

The liquidator may vary or add to the list of contributories, following the same procedure as in the case of the original settlement of the list. Thus, if he discover that additional persons have agreed to take shares, he may prepare and make out a supplemental list (Rule 82 and Form 47).

In the case of unregistered companies and associations being wound up under Part VIII. of the Act the list of contributories will be determined by the liability to contribute to the payment of any debt or liability of the company, or for the adjustment of the rights of members, or the costs of winding up (see Section 269), but only persons who are liable to contribute *as members* must be included; persons who are merely debtors must not be included,² nor must past members³ unless a transfer has been made for an improper purpose,⁴ for there is no provision in the Act as to such members of unregistered companies, except in the Stannaries, where past members are liable unless they ceased to be members for two years either before the mine ceased to be worked or before the winding up (Section 269).

The personal representatives and trustees in bankruptcy of members of an unregistered company are in the same position as in the case of a registered company.

Calls in a Liquidation.

When a company is ordered to be wound up the powers of the directors to make calls cease, the liquidator alone being able to do so; and the Court cannot enable the receiver in a debenture holder's action, or any other person, to make calls.⁵

When the list of contributories is prepared the liquidator (having, if the winding up is by the Court, first obtained the sanction of the Court or, if the liquidation is in England, of the committee of inspection)⁶ must make such calls upon the persons

¹ The Official Receiver cannot be made personally liable for the costs of an appeal against his decision in settling the list (Rule 81 [2]).

² Lee and Moor's Case, [1868] 5 Eq. 308, British Nation Life Assurance Association, [1878] 8 Ch. D. 708.

³ Moore and De La Torre's Case, [1871] 18 Eq. 661.

⁴ Fowler v. Broad's Patent Night Lights Co., [1893] 1 Ch. 724.

⁵ If the committee of inspection improperly refuse to sanction a call the Court will override their decision and give the necessary sanction (*re* North Eastern Insurance Co., [1915] W. N. 210, 85 L. J. Ch. 751).

⁶ *Ex parte Lattledale*, [1874] 9 Ch. 237.

for the time being settled on the list of contributories, whose shares are not fully paid, as he deems necessary for paying the costs of the winding up and the debts of the company.¹ He may make calls in the aggregate exceeding the amount required if he has reason to think that the contributories will not all pay up in full (Section 166 and Section 186 (v.)), or he may enforce a call previously made by the directors,² but the simpler course is to make a new call, unless interest has accrued in respect of calls made before the liquidation.

The liquidator should make calls in respect of any shares supposed to be fully paid, but which are not in fact properly protected (such as shares issued at a discount and shares for which the company has not received valuable consideration).³ If he does not make such calls he is not in a position to enforce payment against the contributories, although he may obtain a declaration of their liability to pay what may be called, and subsequently when the call is made he will be able by fresh proceedings to enforce it.⁴

The liability to contribute in a winding up is a liability created by Statute (Section 125), and takes the place of the liability which previously existed under the Articles of Association to pay calls when made by the directors.⁵ Accordingly the liability cannot be affected or controlled by the Articles or by contract with the company,⁶ nor do the provisions of the Articles as to interest on calls apply to those made in the liquidation.⁷ Moreover, the Statute of Limitations runs from the time the liquidator makes the call, and even when a call made by the directors is Statute-barred the liquidator can enforce a call made by himself.

The amount called is "a debt (in England and Ireland of the nature of a specialty) accruing due from him at the time when his liability commenced,⁸ but payable at the times when calls are made" by the liquidator (Section 125), and in the bankruptcy of a

¹ Even if the debts are disputed (*Contract Corporation*, [1867] 2 Ch. 95).

² *Stone v. City and County Bank*, [1878] 3 C. P. D. 282. *Westmoreland Slate Co. v. Fielden*, [1891] 3 Ch. 15.

³ *Welton v. Saffery*, [1897] App. Ca. 209; *Weymouth and Channel Islands Steam Packet Co.*, [1891] 1 Ch. 66.

⁴ *Re E. J. Wragg*, [1897] 1 Ch. 802.

⁵ *Burgess's Case*, [1880] 15 Ch. D. 507.

⁶ *Newton v. Anglo-Australian Investment Co.*, [1895] App. Ca. 244.

⁷ *Welsh Flannel Co.*, [1875] 20 Eq. 300.

⁸ That is when the contributory first contracted to become a member (*ex parte Cauwell*, [1860] 4 De G. J. & S. 539; *Williams v. Harding*, [1866] L. R. 1 H L. 29; *ex parte Hatcher*, [1879] 12 Ch. D. 284).

contributory the liquidator may prove against his estate "the estimated value of his liability to future calls as well as calls already made" (Section 127, Sub-section 2).

From this it follows that if a company is indebted to one of its members, and before the winding up the member assigns the debt to a stranger, the company can only set off against the debt calls made previously to notice of the assignment,¹ but if the winding up precedes the notice of assignment the company can, by virtue of this section, set off calls made subsequently.² If the call fixes a day certain for payment, and states that interest will be payable in default of payment, the case is governed by 3 & 4 Will. IV., Ch. 42, and interest must be paid from the day named.³

In making calls, the liquidator is not bound by any agreement which may have been made between the members and the company, and he may call up the amount unpaid with greater rapidity than the prospectus and Articles would have allowed the directors to do.⁴

The call will be made by a declaration under the hand of the liquidator, which in a voluntary winding up he should enter in the minute book of his proceedings, but in a winding up by the Court he must file with the Registrar (Rule 85). He must then give notice to the persons liable to pay.

In a compulsory winding up Rule 83 gives the liquidator in England the power of making calls conferred on the Court by Section 166, but requires him to summon a meeting of the committee of inspection to sanction the call. If there is no committee of inspection the leave of the Court to make a call must be obtained (Rule 83 [5]).

As has been already seen, the liquidator has power to prove in the bankruptcy of a contributory for calls made or the estimated value of future calls⁵; and in a compulsory winding up with the sanction of the committee of inspection or of the Court, or in a voluntary winding up with the sanction of an extraordinary resolution, he has power to compromise claims of the company upon contributories.

Calls may be made, after all the debts have been paid, for the purpose of adjusting the rights of the contributories among themselves, and for this purpose holders of fully paid shares must be deemed to be contributories.⁶ Thus, if, after the debts

¹ *Christie v. Taunton & Co.*, [1893] 2 Ch. 175.

² *China Steamship Co.*, [1899] 7 Eq. 240.

³ *Barrow's Case*, [1898] 3 Ch. 784; *ex parte Lantott*, [1867] 4 Eq. 184.

⁴ *Cordova Union Gold Co.*, [1891] 2 Ch. 580.

⁵ *Re McMahon*, *Fuller v. McMahon*, [1900] 1 Ch. 173.

⁶ *Anglesea Colliery Co.*, [1896] 1 Ch. 555; *ex parte Maude*, [1871] 6 Ch. 51.

are paid and the assets are exhausted, some members have paid up twenty pounds per share and others only ten pounds, a call must be made upon the latter to raise such a sum as will, when returned to the members of the former class, make the amounts paid up equal.¹ In a voluntary liquidation directors (if any) may enforce the calls by forfeiture or sale of the shares, and if there are no directors the company may meet and elect directors for that purpose.²

Whether in a voluntary or compulsory winding up, the usual and proper method of enforcing calls is by obtaining an order known as a "Balance Order." In a compulsory winding up the Court has power, under Section 166, to make an order on any contributory to pay the amount of calls made in such winding up, and by Section 193 the liquidator in a voluntary winding up may apply to the Court to exercise, as respects the enforcing of calls, any power which the Court might enforce if the company was being wound up by the Court. This is usually done by a summons,³ in which all the contributories in default are included.⁴ But in a case where there is a real dispute as to liability an action should be brought for the payment of the calls. The Irish Court will allow an originating summons to be issued in Ireland to compel defaulting shareholders in an English company to pay calls made by the liquidator.⁵

In the case of a Company Limited by Guarantee having a share capital every member is "liable, in addition to the amount undertaken to be contributed by him, . . . to contribute to the extent of any sums unpaid on any shares held by him" (Section 123, Sub-section 3). This appears to alter the law as established by the Act of 1862, under which it was held that, though liable to be sued, the member was not liable to be placed on the list of contributories in respect of such sums.⁶

¹ See *ex parte Maude*, [1871] 6 Ch. 51; *Anglo-Continental Corporation*, [1898] 1 Ch. 327. This principle may, of course, be varied by the Articles (see *Kinatan (Borneo) Rubber, in re*, [1923] 1 Ch. 124, cited page 610, note ¹, *infra*).

² *Ladd's Case*, [1903] 3 Ch. 453.

³ Where an action for calls was commenced before a winding up, and the liquidator discontinued the action and took out an originating summons for a balance order, the Court refused to stay the proceedings till the costs of the discontinued action had been paid, but directed that those costs should be deducted from the amounts recovered by the liquidator on the summons (*United Service Association*, [1901] 1 Ch. 97). In other cases where liability was disputed proceedings have been stayed till the costs were paid.

⁴ It has been held that such a summons could not be served out of the jurisdiction (*Anglo-African Steamship Co.*, [1886] 32 Ch. D. 318, *Westmoreland Slate Co. v. Fielden*, [1891] 3 Ch. 15); but see now Order XI., Rule 8A, of the R. S. C.

⁵ *Re Bank of Egypt*, [1913] 1 Ir. R. 502.

⁶ *Lion Insurance Co. v. Tucker*, [1884] 12 Q. B. D. 176.

Moneys payable under the Articles of Association—*e.g.* the contributions in the case of a Mutual Insurance Association—can be recovered by action in the winding up,¹ but not as calls.

Calls can be made and enforced in the case of an unregistered company being wound up under Part VIII. of the Act.²

Until recently neither the Act nor the Rules enabled service of any order requiring to be enforced to be made out of the jurisdiction³; but preliminary notices, such as notice of an appointment to settle the list of contributories⁴ or notice of intention to make a call,⁵ might be served out of the jurisdiction. A recent Rule (Order XI., Rule 8A) may affect these decisions.

If proof is given that there is probable cause for believing that a contributory is about to abscond or remove or conceal his goods for the purpose of avoiding payment of calls, or avoiding examination in respect of the affairs of the company, the Court may order him to be arrested, and his books, moneys, and goods seized and kept (Section 176). This power is seldom used, but has been resorted to in the case of a director.⁶

INSPECTION OF BOOKS AND PAPERS OF COMPANY.

In a winding up by or under the supervision of the Court creditors and contributories may obtain an order allowing them to inspect the books and papers in the possession of the company (Section 221). In a voluntary winding up they may apply to the Court for the same purpose under Section 193. The order is rarely refused unless special circumstances exist. On the commencement of a winding up the right which previously existed of inspecting the Register of Members under Section 30 and the Register of Mortgages under Section 100 ceases.⁷

The file of proceedings in a compulsory winding up, on which are placed all petitions, affidavits, summonses, orders, proofs, depositions, bills of costs, and other proceedings (Rules 16 and 17), except depositions taken at a private examination (Rule 73 [2]), may be inspected by any director or officer of the company free of charge, and by any creditor or contributory on payment of one shilling, and for this purpose no order of Court is necessary

¹ *Re Muggeridge*, [1870] 10 Eq. 443.

² *Hangor and North Wales Mutual Marine Protection Association*, [1899] 2 Ch. 509.

³ *Anglo-African Steamship Co.*, [1886] 32 Ch. D. 348; *re Jellard*, [1888] 39 Ch. D. 424; *Land Credit Co. of Ireland*, [1870] 39 L. J. Ch. 389; *Westmoreland Slate Co. v. Fielden*, [1891], 3 Ch. 15.

⁴ *Nathan, Newman & Co.*, [1887] 35 Ch. D. 1; *Liebig's Cocoa Works*, [1888] W. N. 120.

⁵ *General International Agency*, [1867] 16 L. T. 725, 15 W. R. 303.

⁶ *Imperial Mercantile Credit Co.*, [1898] 5 Eq. 284.

⁷ *Kent Coalfields Syndicate*, [1898] 1 Q. B. 754; *Somerset v. Lands Securities Co.* 1897] W. N. 20.

(Rule 19). The depositions taken under Section 174 may only be inspected with the leave of the Court (Rule 73 [2]), which will only be granted when a special case is made.¹ When leave to inspect is obtained, there is also a right to take copies and extracts, for this is involved in the right to inspect.² It would not be so if other provision were made by the Acts or Rules for obtaining copies,³ but in the absence of such provision the liquidator cannot require the person desiring copies to obtain them from him or to pay a fee.⁴

EXAMINATION OF DIRECTORS AND OTHER PERSONS.

In the course of collecting the assets of the company the liquidator is assisted in obtaining information by the provisions of Sections 174 and 175. The former allows the private examination of any persons capable of giving information concerning the affairs of the company; the latter, which is only available in a compulsory winding up and only in England, is a more or less penal proceeding against promoters, directors, and officers of the company who appear from the Official Receiver's report to have been guilty of wrongdoing. From the information acquired in these proceedings, as well as from the papers and documents of the company, and information obtained from third parties, the liquidator will learn whether he has good ground for taking proceedings for the recovery of any property of the company or damages from its officers for any misfeasance.

Public Examination.

Section 148 requires the Official Receiver, where an order has been made for a winding up by the Court in England, to submit a preliminary report to the Court, and also (Sub-section 2), if he thinks fit, to make a further report, or further reports,⁵ stating whether in his opinion any fraud has been committed (see page 499, *supra*), and by Section 175 "the Court may, after consideration of the report,⁶ direct that any person who has taken any part in the promotion or formation of the company, or has been a director

¹ Merchants' Fire Office, [1809] 1 Ch. 432.

² Nelson v. Anglo-American Land Co., [1897] 1 Ch. 130.

³ Balaghât Gold Mining Co., [1901] 2 K. B. 665.

⁴ *Re Arauco Co.*, [1899] W. N. 134.

⁵ These reports are absolutely privileged, so that no action for libel will lie against the Official Receiver in respect of the statements contained in them (*Bottomley v. Brougham*, [1908] 1 K. B. 584). Similarly, the reports made by the Board of Trade to Parliament are absolutely privileged (*Burr v. Smith*, [1900] 2 K. B. 306).

⁶ That is, the further report. The order cannot be made without the second report (*ex parte Barnes*, [1896] App. Ca. 153).

or officer of the company, shall . . . be publicly examined as to the promotion or formation or the conduct of the business of the company, or as to his conduct and dealings as director or officer thereof." There are no similar provisions in the case of a voluntary winding up, or in the case of a winding up in Scotland or Ireland.

In the High Court the examination is to be held before the Judge, or before a Registrar or other officer of the Supreme Court named in Section 175, Sub-section 9; and the Registrar or other officer may adjourn the examination or any part of it to be held before the Judge (Rule 62). In other Courts the examination is before the Judge. In practice in the High Court the examination is held before the Registrar.

The Official Receiver, the liquidator, and any creditor or contributory may take part in the examination personally or by solicitor or counsel (Section 175, Sub-sections 2 to 4), and the Court may put questions.

The examination shall be on oath, and the person examined is bound to answer all questions which the Court shall allow. If the examination is before an officer who has no power to commit, a person refusing to answer a proper question is reported to the Judge (Rule 72). There is no rule preventing a man from refusing to answer on the ground that his answer might tend to incriminate himself. A person to be examined is entitled, at his own expense, to have, prior to the examination, a copy of the report of the Official Receiver, and to employ a solicitor, with or without counsel, who may re-examine him "for the purpose of enabling him to explain or qualify any answers given by him." In practice the Registrar allows in re-examination questions to elucidate any matter fairly arising, and permits witnesses to explain or deny suggestions made against them during the evidence of other persons.

The Court has power to issue a warrant for the arrest of any person ordered to attend for examination who fails to attend or who absconds, or in whose case there is reason to believe that he is about to abscond with a view to avoiding examination (Rule 66).

If in the opinion of the Court any person examined is exculpated from any charges made or suggested against him, the Court may allow him out of the assets of the company¹ (if any) such costs as the Court thinks fit (Section 175, Sub-section 6). Very

¹ The Official Receiver cannot be made personally liable for the costs of the public examination, but if he has appeared and opposed the application for exculpation he will have become a litigant and be liable for the costs of that proceeding (*re* John Tweddle & Co., [1910] W. N. 109).

few applications for this purpose have been made. It is not usually prudent to reopen questions of this sort unless a very strong case can be made.

Notes of the examination are taken in writing (in practice always in shorthand under Rule 71), and read over to and signed by the person examined, after which they may be used in evidence against him. These notes are filed with the Registrar (Rule 67), and any creditor or contributory may inspect them at all reasonable times (Rules 17 and 19).

It must be borne in mind that this examination is of a penal character. It is set in motion by the Official Receiver, who is a public officer, acting judicially in making his report, and bound to take the responsibility for what he alleges in his report.¹ Upon this report the Court will not "think fit" to order a public examination unless it "arrives at a judicial conclusion" that it is bound to do so,² and it will not do so unless the further report of the Official Receiver shows that there has been fraud³ on the part of the persons to be examined.⁴ It is not, however, necessary that in the report there should be an express statement that there has been fraud if the facts stated are such as to show that fraud existed.⁵ On the other hand, if fraud is charged, the report must state facts showing a basis for the charge and connecting the person sought to be examined with such facts, and must express the opinion of the Official Receiver that there has been fraud by that person.⁶ The persons who may be publicly examined are only those directors, promoters, and officers against whom a *prima facie* case of fraud is disclosed, the practice which formerly prevailed of examining the innocent as well as the guilty being wrong⁷; but no account of fraud practised by the company on strangers will be taken for this purpose.⁸

There is no definition of the word "officers." It has been held by the Court of Appeal that auditors are officers,⁹ and the secretary has frequently been reported and examined. Whether such persons as accountants, cashiers, or persons managing agencies are officers is very doubtful.

¹ [1894] W. N. 44.

² *Ex parte Barnes*, [1890] App. Ca. 150.

³ *Trust and Investment Corporation of South Africa*, [1892] 3 Ch. 332; *W. Luxon & Co.* No. 3, [1893] 1 Ch. 210; *General Phosphate Corporation*, [1895] 1 Ch. 3.

⁴ *Ex parte Barnes*, [1890] App. Ca. 146.

⁵ *Re Birkdale Steam Laundry*, [1893] 2 Q. B. 386.

⁶ *Re Civil, Naval, and Military Outfitters*, [1899] 1 Ch. 215.

⁷ See *ex parte Barnes*, [1890] App. Ca. 150.

⁸ *Re Medical Battery Co.*, [1894] 1 Ch. 444.

⁹ *London and General Bank*, [1895] 2 Ch. 116, followed, but doubted, in *Kingston Cotton Mill Co.* No. 1, [1890] 1 Ch. 6 (see page 348, *supra*).

The examination is a roving inquiry, not confined to a pre-determined issue, so long as it relates to "the promotion or formation or the conduct of the business of the company," or as to the conduct and dealings of the person examined "as director or officer thereof." Aggrieved shareholders may seek to obtain information that will be useful in case of future litigation. But the Court will not allow the defendants in an action brought by the company to seek to obtain admissions from directors to be used against the company,¹ and in a case of pending litigation would probably also protect the witness against questions prejudicing his case.

The order for a public examination is made *ex parte* on the application of the Official Receiver.² Any person summoned may move to discharge the order, on the ground that he does not come within the class of persons liable to be examined (*i.e.* that he is not stated in the report to be a director, officer, or promoter), or that the Official Receiver's report does not contain the necessary suggestion of fraud against him or facts forming the basis for such a charge.³ He will not, however, be allowed to question the correctness of the report, or to object that the Official Receiver has drawn wrong inferences.⁴ The application must be made within a reasonable time after notice to the person implicated that the order has been made.⁵

The examination takes place in public and is commenced by the Official Receiver, or some person appointed by him, examining the witness, after which creditors and contributories may put questions, and when these are concluded the witness is re-examined by his counsel or solicitor, or if he is not represented he is invited to give any explanation he may desire.

The answers given at a public examination may be used in evidence in misfeasance proceedings taken against others than the person making them: that is to say, against any one included in the misfeasance proceedings who was or had the opportunity of being present and taking part in the examination. Notice must, however, be given, not less than fifteen days before the hearing, of the parts of the notes intended to be used, and copies must be supplied of the notes or parts of notes (except those of the person's own depositions), and the deponent must be present for cross-examination⁶ (Rule 70).

¹ *Re London and Globe Finance Corporation*, [1902] W. N. 16, 50 W. R. 253.

² *Great Kruger Co.*, [1892] 3 Ch. 307.

³ *Re Civil, Naval, and Military Outfitters*, [1899] 1 Ch. 215, in which case Wright, J., stated that the motion must be made in a reasonably short time.

⁴ *New Travellers' Chambers*, [1895] 1 Ch. 395; *re National Stores*, [1899] 2 Ch. 773.

⁵ *Re National Stores*, [1899] 2 Ch. 773, affirmed by C. A., [1900] 1 Ch. 27. From the 17th May to the 26th July is too long delay.

⁶ *London and General Bank*, [1894] W. N. 155, 63 L. J. Ch. 853.

Private Examination.

Under Section 174 the Court may, after making an order for the winding up of a company, summon "any officer of the company or person known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or any person whom the Court deems capable of giving information concerning the trade, dealings, affairs, or property of the company," and may examine him on oath, and require him to subscribe a note of his evidence. The Court may require him to produce any books and papers in his custody or power relating to the company, but if he has a lien this is without prejudice to such lien, as to which the Court has jurisdiction to determine all questions¹ (Section 174, Sub-section 3). In a voluntary winding up a similar order may be obtained, for Section 193 authorises the Court to exercise all the same powers as in a compulsory winding up. The Court may order a recalcitrant witness to be apprehended and brought before the Court for examination (Section 174, Sub-section 4).

It will be observed that strangers to the company may thus be examined if they are deemed capable of giving useful information. An order for such an examination may be obtained by the Official Receiver, the liquidator, or a creditor or contributory, but the Court has a discretion to make or refuse the order.

The liquidator's application may be made *ex parte* and without affidavit. It is doubtful whether the party ordered to be examined has any right to appeal,² and at all events the Court of Appeal will not interfere with the Judge's discretion unless there has been a serious miscarriage of justice,³ or unless the application is oppressive.⁴ The order will not be made on the application of a creditor or contributory without strong grounds being shown,⁵ and a dissentient member will not be allowed to use this procedure to obtain evidence for valuing his interest in the company.⁶ Notice of the application by a creditor or contributory should first be given to the liquidator; and even if the order is made an undertaking may be required from the person obtaining the order not to disclose the information obtained in the examination.⁷ The procedure is freely used with a view to

¹ The mere reservation of his lien does not give the solicitor any right or priority which he would not otherwise have had (*Rorie v. Stevenson*, [1908] S. C. 550, Court of Sess.).

² *Re Gold Co.*, [1879] 12 Ch. D. 77. Compare *North Australian Territory* [1890] Co., 45 Ch. D. 87. ³ *Re Joseph Hargreaves, Limited*, [1900] 1 Ch. 347.

⁴ *Heiron's Case*, [1880] 15 Ch. D. 139.

⁵ *Imperial Continental Water Corporation*, [1886] 33 Ch. D. 314; *Heiron's Case*, [1880] 15 Ch. D. 139, *Whitworth's Case*, [1882] 19 Ch. D. 118.

⁶ *British Building Stone Co.*, [1908] 2 Ch. 450.

⁷ *Re Hemp, Yarn, and Cordage Co.*, [1896] (unreported).

ascertaining the means of contributories, and whether or not transactions by directors have been irregular.

The examination is a "proceeding in the Supreme Court," and the Court has jurisdiction to order the person on whose application the examination was ordered to pay the personal expenses and costs of the persons examined.¹

A witness is entitled to require a reasonable sum for his expenses (Section 174, Sub-section 4).

In ordinary cases where information is sought the examination is made in private, usually before the Registrar; and not only the public, but even creditors and contributories, will be excluded unless specially authorised by the Court to be present or take part in the examination.² A general order giving leave to attend proceedings in the winding up will not be sufficient.³ The Official Receiver may always attend and take notes (Rule 73 [1]). Rule 73 [2] expressly declares that these depositions shall not be filed or be open to inspection unless and until the Court shall so direct. The Court may even require the solicitor representing the witness to give an undertaking not to disclose to any third party what passes at the examination,⁴ but can, if it thinks fit, also allow disclosure to be made,⁴ and a director who is subsequently sued will be allowed to see his own depositions before answering interrogatories.⁵

The witness must give all the information in his power, including matters of hearsay,⁶ and can only refuse to answer questions on the ground that they might tend to incriminate himself, or on the ground of professional privilege.⁷ He must produce any documents which are in his custody or control and are asked for.

The examination is conducted by the liquidator or the person to whom the Court grants the order. The Court, however, may disallow any question which it considers ought not to be put.⁸

¹ Appleton, French and Scrifton, Limited, [1905] 1 Ch. 749.

² It seems the Court can order the examination to be held in public, but this power will only be used in very exceptional circumstances (Property Insurance Company, [1914] 1 Ch. 776).

³ Western of Canada Oil Lands and Works Co., [1877] 6 Ch. D. 109, Grey's Brewery, [1884] 25 Ch. D. 400; Norwich Equitable Fire Co., [1884] 27 Ch. D. 515.

⁴ London and Northern Bank, Haddock's Case, [1902] 2 Ch. 73.

⁵ Merchants' Fire Office, [1899] 1 Ch. 432.

⁶ Ottoman Co., [1867] 15 W. R. 1069.

⁷ Silkstone and Dodworth Coal and Iron Co., [1882] 19 Ch. D. 121. See note following.

⁸ North Australian Territory Co., [1890] 45 Ch. D. 87. An officer of a company in liquidation was compelled to answer questions as to what he had done with the company's documents, though such questions tended incidentally to defeat a claim of privilege raised by a third party in an action brought against him by the company (*re* London and Northern Bank, [1901] 18 T. L. R. 130, 206); but the solicitor to the third party, who had documents belonging to the company in his possession, successfully claimed privilege when asked from whom he had received them (*re* London and Northern Bank, [1901] 18 T. L. R. 403). But *semble* the solicitor's principal is not protected (*re* London and Northern Bank, [1901] 18 T. L. R. 537). See also the same case, 85 L. T. 698, 50 W. R. 262.

Any other person who has leave to take part in the examination may, subject to the directions of the Registrar, put any questions he may think fit. In either case counsel or a solicitor may be employed, and the witness may be represented by counsel or solicitor, who may re-examine him.¹

A private examination should not be used in the course of an action to get information from the opposing party which cannot be obtained by interrogatories,² and was refused when asked for by a dissentient member seeking information to assist him in the arbitration to determine the value of his interest³; but if a former officer of the company is assisting its opponents and supplying them with documents it may be proper to examine him.⁴

The answers of the witness are officially taken down in writing and read over to him, and he must then sign the note. The Official Receiver may take notes (Rule 73), but no other person may do so except for the purpose of re-examination, and even these must be destroyed as soon as the examination is complete.⁵

The answers given by a witness are evidence against himself, but not against other persons.⁶

Although, as above mentioned, the examination is usually a private inquiry to obtain information, it is not necessarily so, and under Rule 5 in the High Court the examination may be ordered to be held in court. This provision appeared for the first time in the Rules of 1903, but for some time previously persons were *by consent* examined in open court. This has particularly been the case since it was held that public examinations under The Winding-Up Act, 1890 (now Section 175), could be ordered only when those to be examined had been guilty of fraud. It was then seen that it might be convenient to take the evidence of innocent persons and of those who were not officers of the company in public, so that the whole of the evidence might be heard; and, indeed, this was often the only way of enabling a person to answer charges made against him by the witnesses under examination. It was usually considered that the private examination could only be taken in public if the witness consented. Under Rule 5 the Judge can now direct any examination to be in open court.

¹ Cambrian Mining Co., [1882] 20 Ch. D. 376.

² North Australian Territory Co., [1890] 45 Ch. D. 87.

³ British Building Stone Co., [1908] 2 Ch. 450.

⁴ London and Northern Bank, Archer's Case, [1901] 85 L. T. 608, 50 W. R. 262.

⁵ Heseltine & Co., [1891] W. N. 25. Compare London and Northern Bank, Haddock's Case, [1902] 2 Ch. 73.

⁶ Norwich Equitable Fire Co., [1884] 27 Ch. D. 517.

A summons is the proper method of securing the attendance of a witness.¹ A witness who fails to attend may be apprehended,² or an order may be made that he do attend and pay the costs occasioned by his default³; failure to obey such an order is punishable as contempt.

COLLECTING THE ASSETS.

By Section 150, Sub-section 1, "in a winding up by the Court the liquidator shall take into his custody, or under his control, all the property and things in action to which the company is or appears to be entitled," and this is one of the powers exercisable by a voluntary liquidator under Section 186 (iv.). The Rules provide that in a winding up by the Court the liquidator "shall for the purpose of acquiring or retaining possession of the property of the company, be in the same position as if he were a receiver⁴ of the property appointed by the High Court, and the Court may, on his application, enforce such acquisition or retention accordingly" (Rule 75 [2]).

On the appointment of the liquidator the Official Receiver must put him in possession of all property of the company of which the Official Receiver may have custody (Rule 161).

Section 164 empowers the Court to "require any contributory for the time being settled on the list of contributories, and any trustee, receiver, banker, agent, or officer of the company to pay, deliver, convey, surrender, or transfer forthwith, or within such time as the Court directs, to the liquidator any money, property, or books and papers in his hands to which the company is *prima facie* entitled,"⁵ and Rule 76 directs that these powers shall be exercised by the liquidator, and that the persons named in the section shall, "on notice from the liquidator and within such time as he shall by notice in writing require, pay, deliver, convey, surrender or transfer to or into the hands of the liquidator" the said money, balance, books, papers, estate, or effects.

Under the above section of the Act the Court has ordered a director to deliver possession of a colliery which he had agreed to

¹ English Joint Stock Bank, [1867] 3 Eq. 203; Credit Co. v Webster, [1885] 53 L. T. 420.

² Haven Gold Mining Co., *per* Bacon, V.C., 30th May, 1894.

³ Trower and Lawson's Case, [1872] 14 Eq. 8, Lisbon Steam Tramway, [1876] 2 Ch. D. 575; Silkstone and Dodworth Coal and Iron Co., Whitworth's Case, [1881] 50 L. J. Ch. 752, 30 W. R. 33.

⁴ It is a contempt of Court to interfere with a receiver appointed by the Court, and it would seem that in whatever court the winding up may be conducted the liquidator is in the position of a receiver appointed by the High Court.

⁵ In a voluntary winding up the liquidator can apply to the Court under Section 193 to enforce this right.

sell to the company,¹ and a receiver for debenture holders to hand over such of the books of the company as were not necessary for establishing the title of the debenture holders.² But the section and Rules must not be strained to bring within them persons who are not within the express words (*e.g.* ordinary debtors or persons who have indirectly obtained moneys of the company³), and the section does not give the Court or liquidator any power to enforce payment or delivery, even from the person named, where there is a dispute as to the liquidator's right. In such a case he must take proceedings by action in the ordinary way.⁴

For the purpose of recovering moneys due to the company or property to which it is entitled the liquidator must resort to an action at law under Section 151, which empowers him "to bring or defend any action or other legal proceeding in the name and on behalf of the company"; but he must in a compulsory winding up first obtain the sanction of the Court, or in England that of the committee of inspection. There is no power to compel a debtor to the company to submit to have his case decided upon a summons in the winding up, although frequently by consent questions in dispute are thus determined.

In the case of an unregistered association, which has no power to sue or be sued in a common name, the liquidator should get an order under Section 272, vesting the company's property in him. He may then sue in his official name, or, if the Court so directs, in any other name on giving indemnity.

It is to be noted that the power of the Court under Section 167 to order contributories or purchasers or other persons from whom money is due to pay sums due from them into the Bank of England is not by the Act conferred on the liquidator; but he may of course apply to the Court to make such an order.

When property is received by the liquidator or comes under his control he may, with the consent of the Court, or in England of the committee of inspection, sell it by public auction or private contract, and either together or in parcels (Section 151). In a voluntary winding up the liquidator can sell without obtaining any sanction (Section 186 (iv.)).

Section 164, requiring the delivery over of money, property, and books, does not apply in a voluntary winding up; but the liquidator can apply to the Court under Section 193 to exercise these powers.

¹ *Oakwell Collieries Co.*, [1879] W. N. 65.

² *Engel v. South Metropolitan Brewing Co.*, [1892] 1 Ch. 442.

³ *United English and Scottish Assurance Co.*, [1868] 3 Ch. 787; *Imperial Land Co. of Marseilles*, [1870] 10 Eq. 298.

⁴ *Vimbos, Limited*, [1900] 1 Ch. 470; *Re Palace Restaurants* [1914] 1 Ch. 492.

PROCEEDINGS AGAINST DELINQUENT DIRECTORS, PROMOTERS,
AND OFFICERS.

Proceedings against directors, promoters, and officers may be taken by the liquidator or any creditor or contributory under Section 215, by which it is provided, in reference to every manner of winding up—"Where in the course of winding up a company it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager, or liquidator, or any officer of the company, has misapplied or retained or become liable or accountable for any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of the Official Receiver, or of the liquidator, or of any creditor or contributory, examine into the conduct of the promoter, director, manager, liquidator, or officer, and compel him to repay or restore the money or property or any part thereof respectively with interest at such rate¹ as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance, or breach of trust as the Court thinks just."

In Scotland or Ireland the section does not apply to promoters or to property other than money (Sub-section 4).

Under this section the liquidator is the proper person to apply for the recovery of money or damages payable to the company. It was, however, doubted in one case whether the liquidator could claim the repayment of dividends paid out of the capital, and to meet the difficulty a creditor was added as co-applicant,² but now there seems to be no such doubt.³ It often happens, moreover, that the liquidator, and particularly when such liquidator is the Official Receiver, before taking any steps, requires a satisfactory indemnity, and failing this will not move in the matter. If the liquidator does not take proceedings any creditor or contributory may apply, provided that the state of the assets is such that a benefit will result to the applicant from a successful issue of the proceedings. Thus, in the case of a company whose assets (including what was recovered on the summons) would suffice to pay only a dividend to creditors, a contributory would have

¹ In *re* National Bank of Wales, [1899] 2 Ch. 650, the rate allowed was five per cent., and no deduction was allowed for income tax. The respondent was on appeal discharged from all liability (see [1899] 2 Ch. 664 and [1901] App. Ca. 477 in *H. L. sub nom. Dovey v. Cory*).

² *Re* National Funds Assurance Co., [1879] 10 Ch. D. 118.

³ *Re* National Bank of Wales, [1899] 2 Ch. 650.

no *locus standi* to apply. This was declared in the House of Lords in a case¹ where the assets were obviously insufficient to provide anything for the contributories, and was followed in the case of New Travellers' Chambers, Limited. There, on the application of a contributory, Vaughan Williams, J., found in favour of the applicant's contention, and fixed the damages at £5000, which was ample to allow of a return of capital to the contributories. The Court of Appeal held² that the damages awarded were excessive, and, as the amount they were prepared to award would leave nothing for the contributories, dismissed the summons. A creditor then took out a fresh summons, and Wright, J., held that the previous application was, in the circumstances, not a bar to the new proceeding. The respondents thereupon offered the Official Receiver, who was liquidator, a sum calculated upon the judgment of the Court of Appeal, and the Court sanctioned the acceptance by the liquidator of this amount, and stayed further proceedings on the creditor's summons.

This section does not create any new liability on the persons named, but only provides a method of enforcing rights which might have been enforced by an action before the winding up, and which even after the winding up may, if more convenient, be so enforced.³

But the word "misfeasance" does not cover every misconduct by an officer of the company, as such, for which he might have been sued apart from the section: for the section only refers to the recovery of assets. It "means misfeasance in the nature of a breach of trust: that is to say, it refers to something which the officer has done wrongly by misapplying or retaining in his own hands any money of the company, or by which the company's property has been wasted or the company's credit improperly pledged; it must be something resulting in actual loss to the company."⁴ But elsewhere it has been defined as consisting of any breach of duty of an officer, in his capacity as officer, which results in an improper application of the assets or property of the company,⁵ including property which ought to have come to the

¹ *Bentnck v. Fenn*, [1887] 12 App. Ca. 652.

² See [1895] 12 Times L. R. 579.

³ *Coventry and Dixon's Case*, [1880] 14 Ch. D. 660, 670; *Bentnck v. Fenn*, [1887] 12 App. Ca. at page 669; *Irish Provident Assurance Co.*, [1913] 1 Ir. R. 352.

⁴ *Coventry and Dixon's Case*, [1880] as above; *Bentnck v. Fenn*, [1887] 12 App. Ca. at page 659.

⁵ *Kingston Cotton Mill Co. No. 2*, [1896] 2 Ch. at pages 283, 288, and 291, where auditors who failed to use reasonable skill and care were held to be within the section. This is nonfeasance rather than misfeasance (see also *Brazilian Rubber Estates*, [1911] 1 Ch. at page 440). It is possible that the House of Lords might revert to the definition given by James, L. J., and Lord Macnaghten in the cases cited in note ⁴, but the Court of Appeal would be bound by the *Kingston Cotton Mill's case*.

company, but has been intercepted, for "money had and received for the use of the company may in equity, without impropriety, be called money of the company."¹ This, therefore, includes negligence and cases not "in the nature of a breach of trust." It is necessary in every case to show that pecuniary loss resulted to the company.²

Proceedings under this section may be taken against all or any of the persons named for any misfeasance resulting in loss of assets to the company. Accordingly, a promoter who has made a secret profit can be compelled to repay it,³ and where the directors participated in the profit, the fact that they knew of it does not protect the promoter if the shareholders were ignorant of it,⁴ even though they might have discovered it by reading the contracts referred to in the prospectus.⁵ But if a promoter has disclosed that he is re-selling at a profit property he has recently acquired, he is not liable to account for such profit, even though the amount of it was concealed,⁶ unless he was promoter at the time when he acquired the property⁷ (see page 108, *supra*).

Directors may be ordered to repay moneys improperly paid to a promoter,⁸ or money paid to a contractor for an improper purpose,⁹ or for underwriting the capital in an unlawful manner,¹⁰ or the amount of shares issued as fully paid under the pretence that they were part of the purchase consideration but were in fact promotion money,¹ moneys paid by way of fraudulent preference of creditors,¹² or the discount at which shares have been issued if by reason of the subsequent sale of the shares the holders are not liable to calls.¹³

The section may also be used to procure the repayment of moneys improperly received by directors, officers, or agents of the company, as, *e.g.*, remuneration improperly received by the

¹ *Sale Hotel and Botanical Gardens*, [1898] 78 L. T. 368.

² *Bentnck v. Fenn*, [1887] 12 App. Ca. 652; *Irish Provident Assurance Co.*, [1913] 1 Ir. R. 352.

³ *Gluckstein v. Barnes*, [1900] App. Ca. 240; *Leeds and Hanley Theatres of Varieties*, [1902] 2 Ch. 800.

⁴ *Erlanger v. New Sombbrero Co.*, [1879] 3 App. Ca. 1218; *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392.

⁵ *Re Sale Hotel Co.*, [1897] W. N. 175; *Olympic, Limited*, [1898] 2 Ch. 153, [1900] App. Ca. 240, *sub nom.* *Gluckstein v. Barnes*.

⁶ *Ladywell Mining Co. v. Brookes*, [1887] 35 Ch. D. 400; *Lady Forrest (Murchison) Gold Mine*, [1901] 1 Ch. 582; *Burland v. Earle*, [1902] App. Ca. 98. The promoter is equally protected if he acquired an option over the property before becoming a promoter (*Gover's Case*, [1870] 1 Ch. D. 182).

⁷ *Gluckstein v. Barnes*, [1900] App. Ca. 240.

⁸ *Ex parte Pelly*, [1882] 21 Ch. D. 402.

⁹ *London Trust Co. v. Muckenzie*, [1893] W. N. 9.

¹⁰ *Faure Electric Accumulator Co.*, [1889] 40 Ch. D. 141.

¹¹ *Bland's Case*, [1883] 2 Ch. 612.

¹² *Washington Diamond Co.*, [1893] 3 Ch. 95.

¹³ *Hirsche v. Sims*, [1894] App. Ca. 654.

directors¹; commission taken from persons doing business with the company, or presents made by promoters²; profits made by purchasing shares from the vendor below par³; and where a promoter agreed to purchase the directors' qualification at par, and did so, the director was held liable to account to the company for the money so received.⁴ Where several directors receive secret profits, knowing of the gifts to each other, they are jointly and severally liable for the aggregate amount received by them all.⁵

It is a misfeasance for directors to put themselves under the control of the promoters, as, for instance, by holding their qualification shares in trust for the promoters and giving blank transfers, so that the promoters can at any time displace them. In such a case they will be held liable for the amount of their qualification, and may be liable for acts which the Court considers they did because of their subservient position.⁶

A director of a company who has received moneys of the company which it was *ultra vires* for it to pay to him can be made to repay at the instance of the liquidator or creditors, although all the directors and shareholders knew and approved of the payment.⁷ But it is otherwise if the payment was *intra vires*.⁸

If all the directors accept gifts from the promoter, the knowledge that the others are receiving benefits does not form a protection to each; the profit is still secret and improper as regards the company.⁹

In cases of receiving benefits from promoters or vendors complete disclosure of the facts in the prospectus will protect the directors from liability to repay¹⁰; but a partial disclosure in a prospectus which is misleading will not suffice.¹¹

Where directors have improperly received a gift of shares from the promoter the liquidator may claim either the shares

¹ Rance's Case, [1871] 6 Ch. 101, Brighton Brewery Co., Hunt's Case, [1868], 37 L. J. Ch. 278, 16 W. R. 472, Merchants' Fire Office v. Armstrong, [1901] W. N. 163.

² London and Provincial Starch Co., [1869] 20 L. T. 390, Oxford Benefit Building Society, [1887] 35 Ch. D. 502; Carriage Co-operative Supply Association, [1884] 27 Ch. D. 322; Pearson's Case, [1877] 5 Ch. D. 336, Hay's Case, [1875] 10 Ch. 593, De Ruvigne's Case, [1877] 5 Ch. D. 306; Englefield Colliery Co., [1878] 8 Ch. D. 388, Metcalfe's Case, [1880] 13 Ch. D. 169.

⁴ Weston's Case, [1879] 10 Ch. D. 579.

⁵ Archer's Case, [1802] 1 Ch. 322.

⁶ Carriage Co-operative Supply Association, [1884] 27 Ch. D. 322.

⁷ London and South-Western Canal, [1911] 1 Ch. 346.

⁸ Re George Newman & Co., [1895] 1 Ch. 674. But see Innes & Co., [1903] 2 Ch. 254.

⁹ Re British Seamless Paper Box Co., [1881] 17 Ch. D. 467; Attorney-General for Canada v. Standard Trust Co., [1911] A. C. 498.

¹⁰ Carriage Co-operative Supply Association, [1884] 27 Ch. D. 322; Lagunas Nitrate Co. v. Lagunas Syndicate, [1899] 2 Ch. 392; Gluckstein v. Barnes, [1900] App. Ca. 240.

¹¹ Re Postage Stamp Automatic Delivery Co., [1892] 3 Ch. 566.

¹² Re Olympia, Limited, [1898] 2 Ch. 153, [1900] App. Ca. 240, *sub nom.* Gluckstein v. Barnes; Lagunas Nitrate Co. v. Lagunas Syndicate, [1899] 2 Ch. 392.

or their value at par, or their highest value during the time the directors have held them¹; but the market prices are not necessarily conclusive, and the circumstances of the case must be considered.² The company, however, cannot follow the proceeds of any shares sold by the delinquent so as to take the profit he has subsequently made by the use of the money.³

Under this section damages may be recovered in respect of a wilful sale of the assets of the company at less than their proper value,⁴ and damages in respect of frauds upon the company in its formation or promotion. But a director cannot be made to account for profits made upon a re-sale to the company of property purchased by him on his own account and without mandate from the company, even though he purchased the property with a view to such re-sale and re-sold it without disclosing his interest.⁵ Where the purchase price is swollen by fully paid shares to be used for gifts to the directors, the directors cannot be put on the list of contributories as holders of shares not fully paid up⁶; and although in a public company, if the gift was secret or not disclosed in the prospectus, the directors could be made liable for a misfeasance in accepting the shares,⁷ in a private company, where all parties had full knowledge of the facts, no liability attaches either to the vendor or the directors.⁸

The section can also be used to compel directors to make good to the company, with interest, the whole amounts of dividends improperly declared⁹ or paid where there are no profits,¹⁰ for no distinction is made as regards liability between the case of dividends improperly received by the directors themselves and those paid to other shareholders¹¹; but there is the difference that the Statute of Limitations is a protection in regard to dividends

¹ *Eden v. Ridsdale's Railway Lamp and Lighting Co.*, [1889] 23 Q. B. D. 308; *re Postage Stamp Automatic Delivery Co.*, [1892] 3 Ch. 506; *Metcalf's Case*, [1880] 13 Ch. D. 169; *McKay's Case*, [1876] 2 Ch. D. 1; *Ormerod's Case* [1887] 37 L. T. 244, 23 W. R. 705.

² *Shaw v. Holland*, [1900] 2 Ch. 305.

³ *Lister & Co. v. Stubbs*, [1890] 45 Ch. D. 1.

⁴ *New Travellers' Chambers*, [1895] 12 Times L. R. 529; *Park Gate Waggon Co.*, [1881] 17 Ch. D. 239.

⁵ *Burland v. Earle*, [1902] App. Cn. at page 98. The company can rescind such a contract if it is in a position to restore the property.

⁶ *Carling's Case*, [1876] 1 Ch. D. 115; *Innes & Co.*, [1903] 2 Ch. 254.

⁷ See cases cited in last note. The same rule applies where there is an offer of shares to the public, even if none are in fact taken by persons ignorant of the gift (*Postage Stamp Automatic Delivery Co.*, [1892] 3 Ch. 506; *Telescriptor Syndicate*, [1903] 2 Ch. 175).

⁸ *Attorney-General for Canada v. Standard Trust Co.*, [1911] A. C. 498; *re British Seamless Paper Box Co.*, [1881] 17 Ch. D. 467; *Innes & Co.*, [1903] 2 Ch. 254.

⁹ *Stringer's Case*, [1809] 4 Ch. 475; *National Funds Assurance Co.*, [1879] 10 Ch. D. 118, *Oxford Benefit Bldg Society*, [1887] 35 Ch. D. 502; *London and General Bank*, [1895] 2 Ch. 166, 673.

¹⁰ *Re Sharpe and Bennett*, [1892] 1 Ch. 154; *National Bank of Wales*, [1899] 2 Ch. 650.

¹¹ *Flitcroft's Case*, [1892] 21 Ch. D. 536.

paid to others, but not in regard to those taken by the directors.¹ and, further, if the shareholders received their dividends with knowledge that they were paid out of capital, they will be liable to indemnify the directors to the extent to which they have respectively received such dividends,² for which reason it is often made a term of the order that it shall be without prejudice to the directors' right to recover from the shareholders,³ and it has been suggested that an order will not be made against the directors if the only result would be to pay again to shareholders the dividends they have already received³; but it is to be noted that with a fluctuating body of shareholders this will seldom be the case, even in a solvent company, and it is no answer to the claim by the company or its liquidator even if all the creditors have been paid in full.⁴

The directors will, however, escape liability for the repayment of dividends if it appears that they had a *bona fide* and reasonable belief that there were profits available for the payment of the dividends, and for this purpose it has been held that they are justified in relying upon the reports and valuations of trusted officers of the company,⁵ and are not liable if book debts believed to be good prove bad⁶; but they must exercise their discretion in good faith.⁷

A director who took shares in the names of his infant children, although in the special circumstances not liable as a contributory, was ordered to pay the amount of the calls as damages under this section.⁸

Where money is lost to the company through an error of judgment of the directors, it cannot be recovered either under this section or by action.⁹ It has even been said that directors have never been held liable for negligence unless it has been so gross as practically to amount to fraud; but although in some cases it has been suggested that it is necessary to show gross

¹ National Bank of Wales, [1899] 2 Ch. 603.

² Moxham v. Grant, [1900] 1 Q. B. 88.

³ Alexandra Palace Co., [1883] 21 Ch. D. 119, National Funds Assurance Co., [1879] 10 Ch. D. 118.

⁴ *Re* National Bank of Wales, [1899] 2 Ch. 629, *per* Wright, J., at page 646, and *per* C. A. at page 677; Flitcroft's Case, [1882] 21 Ch. D. at pages 534, 535; Towers v. African Tug Co., [1901] 1 Ch. 558.

⁵ Rance's Case, [1871] 6 Ch. 118; Denham & Co., [1883] 25 Ch. D. 706, Dovey v. Cory, [1901] App. Ca. 35. Compare Kingston Cotton Mill Co. No. 2, [1896] 2 Ch. 298.

⁶ City of Glasgow Bank v. Mackinnon, [1882] 9 Court of Sess. Ca., 4th Series 602.

⁷ New Mashonaland Syndicate, [1892] 3 Ch. 577.

⁸ *Re* Greuver & Co., *ex parte* Wilson, [1873] 8 Ch. 45.

⁹ Overend, Gurney & Co. v. Gibb, [1872] L. R. 5 H. L. 480; Dovey v. Cory, [1901] App. Ca. 477; New Mashonaland Syndicate, [1892] 3 Ch. 577.

negligence,¹ on other occasions the phrase has been objected to as meaningless.² The true test appears to be that first a duty must be shown, and then that that duty has been neglected to the detriment of the company, and the charge has more often failed by reason of the difficulty in showing what has been the duty neglected than by inability to prove the neglect. On both points all the circumstances surrounding the acts and the common practice of business men have to be considered. A director is only bound to use such care as may be reasonably expected of him; he is not bound to bring any special qualification to his office or to have knowledge of the particular class of business he controls, but if he has knowledge he must use it to the best of his ability.³ For instance, directors must not be treated as if they were accountants, knowing and understanding all that the books would show if carefully investigated, nor are they liable if deceived by the fraud of others whom they might reasonably trust,⁴ nor must auditors be treated as persons able to value the stock-in-trade of the company,⁵ though auditors must be competent to understand the accounts, for they (unlike directors) are employed as experts.

Non-attendance at board meetings is not such negligence as to create a liability.⁶

By Section 279, if in any proceeding against a director for negligence or breach of trust it appears that he may be liable, but has acted honestly and reasonably and ought fairly to be excused, the Court may relieve him either wholly or partly from his liability on such terms as the Court may think proper.

The directors or others who are wrongdoers will be declared to be jointly and severally liable for the repayments ordered to be made⁷: e.g. auditors whose default has led to a payment of dividend out of capital may be declared liable both severally and jointly with the directors.⁸

Persons who are *de facto* officers (e.g. directors or auditors) are liable under this section, although their appointment may have been irregular.⁹

¹ *Turquand v. Marshall*, [1869] 4 Ch. 376; *Overend, Gurney & Co. v. Gibb*, [1872] L. R. 5 H. L. 480; *Brazilian Rubber Plantations*, [1911] 1 Ch. 425. Compare *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392.

² *Wilson v. Brett*, [1843] 11 M. & W. 115.

³ *Brazilian Rubber Plantations*, [1911] 1 Ch. 425.

⁴ *Dovey v. Cory*, [1901] App. Ca. 477; *Prefontaine v. Grenier*, [1907] App. Ca. 101.

⁵ *Kingston Cotton Mill Co. No. 2*, [1896] 2 Ch. 283.

⁶ *Marquis of Bute's Case*, [1892] 2 Ch. 100.

⁷ *Flitcroft's Case*, [1882] 21 Ch. D. 519; *Marriage Co-operative Supply Association*, [1884] 27 Ch. D. 322.

⁸ *London and General Bank No. 2*, [1895] 2 Ch. 673.

⁹ *Coventry and Dixon's Case*, [1880] 14 Ch. D. 600; *Gibson v. Barton*, [1875] L. R. 10 Q. B. 329; *re Western Counties Steam Bakeries Co.*, [1897] 1 Ch. 617.

The auditors of a bank¹ or of a company whose Articles are similar to those of Table A² are officers within the meaning of this section. The cases cited would bind the Court of Appeal to hold all auditors of companies under the Act to be officers, but in the later case the members of the Court showed dissatisfaction with the decision, and the House of Lords might take another view. As officers auditors are within the section, and are liable to make good a dividend declared upon the faith of an untrue certificate given by them that the balance sheet correctly represented the affairs of the company³; but a person may do the work of an auditor without becoming an officer of the company, or liable under this section, if he never undertook the office of auditor.⁴

The secretary is an officer of the company who may be made liable under this section, *e.g.*, to repay the value of the bonus shares given him by the vendor to the company⁵ unless he makes full disclosure to the company.⁶ The manager, liquidator, and in England "any person who has taken part in the formation or promotion of the company," are expressly mentioned in Section 215, and may accordingly be rendered liable for any misfeasance.

The trustees for debenture holders are not, it seems, officers for the purpose of this section.⁷

Neither the bankers nor the solicitors of a company are officers within the meaning of this section,⁸ unless the solicitors have other duties and occupy a different position from that of purely legal advisers⁹; but if they have in their possession money or property of the company, it may be recovered from them under Section 164. A trustee in whose name funds are or ought to be invested is within the section,¹⁰ but a person appointed to investigate and report upon the management of a company is not an "officer or servant."¹¹

A broker improperly receiving commission on the issue of a prospectus is liable to refund the amount,¹² but in ordinary

¹ *Re London and General Bank*, [1895] 2 Ch. 116.

² *Kingston Cotton Mill Co. No. 1*, [1896] 1 Ch. 6.

³ *Leeds Estate Building Society v. Shepherd*, [1887] 36 Ch. D. 787; *re London and General Bank*, [1895] 2 Ch. 106; *Kingston Cotton Mill No. 2*, [1896] 1 Ch. 331. In the last-mentioned case the auditors were absolved on appeal, but this depended on the special facts (1896, 2 Ch. 279).

⁴ *Re Western Counties Steam Bakeries Co.*, [1897] 1 Ch. 617.

⁵ *McKay's Case*, [1876] 2 Ch. D. 1.

⁶ *Re Sulo Hotel Co.*, *ex parte Hesketh*, [1898] 78 L. T. 368.

⁷ *Astley v. New Tivoli, Limited*, [1899] 1 Ch. 151, 154.

⁸ *Re Imperial Land Co. of Marseilles*, [1870] 10 Eq. 208; *Carter's Case*, [1886] 31 Ch. D. 406.

⁹ *Re Liberator Permanent Benefit Building Society*, [1894] 71 L. T. 406.

¹⁰ *British Guardian Co.*, [1880] W. N. 63, reported on the other points [1880] 14 Ch. D. 335.

¹¹ *Openshaw v. Fletcher*, [1916] 32 T. L. R. 372.

¹² *West of England Paper Mills v. Gilbert*, [1892] 61 L. T. Ch. 92.

circumstances he would not be an officer of the company, and proceedings should therefore be taken by action.

A charge given by debentures on all the assets of a company includes the right to money which may be recovered by a misfeasance summons or in an action¹; and if the debenture holders are not willing to take proceedings the Court may order the receiver to sell the right of action by auction.² A sale of all the assets of the company includes its right of action against directors and officers, and the company can itself no longer enforce the rights thus sold without joining the assignees as plaintiffs.³

A release given in general terms by a company to a director will not be a protection unless it is shown that the matters in question were contemplated at the time of giving the release⁴; but Articles declaring that directors shall be liable only in the case of dishonesty is a protection to them against a claim for negligence.⁵

In the case of the death of a director or other person in the position of a trustee, his estate remains liable for any breach of trust (including payment of dividends out of capital) he may have committed,⁶ but not for negligence,⁷ or trespass,⁸ or deceit, unless his estate has benefited by the fraud⁹; for these are personal actions which die with the person. It was, however, held under Section 165 of the Act of 1862 (which Section 215 supersedes) that proceedings against executors must be by action, and not by summons under the section.¹⁰ Where some of the directors have died proceedings may be taken or continued against the survivors under the section.¹¹

A discharge in bankruptcy does not release a director from liability to refund secret profits; for the retention of them is a fraudulent breach of trust.¹²

¹ *Anglo-Austrian Printing and Publishing Union*, [1895] 2 Ch. 801.

² *Wood v. Woodhouse & Rawson United*, [1896] W. N. 4.

³ *Per Romer, J.*, in *New Travellers' Chambers* (1894, unreported); *Park Gate Waggon Co.*, [1881] 17 Ch. D. 239.

⁴ *Joint Stock Trust and Finance Corporation*, [1912] S. J. 272.

⁵ *Brazilian Rubber Plantations*, [1911] 1 Ch. 425.

⁶ *Erlanger v. New Sombreiro Phosphate Co.*, [1879] 3 App. Ca. 1211; *Ramskill v. Edwards*, [1886] 31 Ch. D. 100; *re Sharpe*, [1892] 1 Ch. 154.

⁷ *Overend, Gurney & Co. v. Gibb*, [1872] L. R. 5 H. L. 480.

⁸ *Phillips v. Homfray*, [1883] 24 Ch. D. 439, where the rule *Actio personalis moritur cum persona* is fully discussed.

⁹ *Peck v. Gurney*, [1874] L. R. 6 H. L. 377.

¹⁰ *Felton's Executors' Case*, [1806] 1 Eq. 219; *British Guardian Co.*, [1880] 14 Ch. D. 335.

¹¹ *British Guardian Co.*, [1880] 14 Ch. D. 335.

¹² *Emma Silver Mining Co. v. Grant*, [1881] 17 Ch. D. 122.

After the lapse of six years either The Trustee Act, 1888 (Section 8), or the Statute of Limitations forms a bar to proceedings for misfeasance, unless the claim is founded upon any fraud or fraudulent breach of trust, or is to recover trust property, or the proceeds thereof, still retained by the respondent or previously received by him and converted to his use,¹ including dividends received by the directors personally out of capital²; for the persons charged must be either trustees, when they get the benefit of The Trustee Act, 1888, or not trustees, when they are protected by the Statute of Limitations. But if there is a concealed fraud the Statute will not run until it is discovered³ or the company has made an investigation of the facts and come to a conclusion not to take proceedings.⁴

An order under Section 215 is in England a final judgment on which a petition in bankruptcy can be founded (see Sub-section 3), but the value of a gift from a promoter recovered thereunder is not money held by the director as a trustee so as to render him liable to be committed to prison under the Debtors Act for non-compliance with the order to pay.⁵

Where the proper Court to wind up the company is a County Court, the proceedings under this section should be taken there, as in the case of registered Industrial Societies and Building Societies, to which this section also applies.⁶

Section 215 applies whether the winding up is by the Court or voluntary. Proceedings under this section should be commenced in the High Court by a summons, and in other Courts by notice of motion setting out the nature of the relief sought and the grounds of complaint,⁷ and should not be joined with a prayer for relief against other persons, as, for instance, a claim against contributories for calls.⁸

Where a liquidator takes out a misfeasance summons which fails the Court has power to make him pay the costs,⁹ although it is usual to direct that the costs shall come out of the assets of the company; but the Court has power to order the respondents whose conduct was blameworthy and was the cause

¹ *Lands Allotment Co.*, [1894] 1 Ch. 617; *National Company for the Distribution of Electricity*, [1902] 2 Ch. 34; and *Trustee Act*, 1888, Section 8.

² *Re National Bank of Wales*, [1899] 2 Ch. 629.

³ *Gibbs v. Guild*, [1882] 9 Q. B. D. 69; *North American Land Co. v. Watkins*, [1904] 1 Ch. 212, and 2 Ch. 233.

⁴ *Metropolitan Bank v. Heiron*, [1880] 5 Ex. D. 319.

⁵ *Metcalfe's Case No. 2*, [1880] 13 Ch. D. 815 (see, however, *re Bourne*, [1906] 1 Ch. 607).

⁶ *Ferndale Industrial Co-operative Society*, [1894] 1 Q. B. 628.

⁷ *New Mashonaland Syndicate*, [1892] 3 Ch. 577.

⁸ *Re E. J. Wrugg*, [1897] 1 Ch. 801, 802.

⁹ *Re W. Powell & Sons*, [1896] 1 Ch. 681; *Western Counties Steam Bakers*, [1897] 1 Ch. at page 632.

of the proceedings to pay the costs, although nothing is in fact recovered from them.¹

The persons ordered under this section to make payments to the liquidator cannot set off other claims which they may have against the company²; and third parties cannot be brought in under a third party notice.³

Upon the misfeasance summons the applicant must prove his case: that is to say, he must prove (1) A mis-application or retention of the moneys of the company, or a misfeasance or breach of trust in relation to the company; (2) That the company has suffered loss thereby; and (3) That the applicant will derive benefit from the application. Thus, if the claim is in respect of secret profit, the applicant must prove affirmatively that the profit was not made known, and that some share of the amount recovered will be distributable among the class to which he belongs.⁴

The application must not be in respect of some injury to an individual: *e.g.* to a contributory left out by the liquidator in the distribution of assets.⁵

The procedure under Section 215 is governed by Rules 68 to 70, but, as mentioned below, the practice is in course of modification. By Rule 68 any application under Section 215 is to be made, when in the High Court, by summons returnable in the first instance in Chambers, to be served (in the same manner in which an originating summons is required to be served by the Rules of the Supreme Court) on every person against whom an order is sought not less than eight days before the day named for hearing the application. In any other Court the application is to be by motion (Rule 68), of which notice must be served not less than eight days before the day named for hearing, and copies of the report and evidence must be supplied not less than four days before the hearing (Rule 69). A motion in the County Court under this section may be transferred to the High Court.⁶ When the Official Receiver or the liquidator applies he may make a report of facts and information on which he proceeds, which are verified by affidavit or derived from sworn evidence in the proceedings. Other applications must be supported

¹ Ireland & Co., [1905] 1 Ir. R. 133.

² Anglo-French Co-operative Society, *ex parte* Pelly, [1882] 21 Ch. D. 402; Fletcher's Case, [1882] 21 Ch. D. 519; Milan Tramways Co., [1884] 25 Ch. D. 597; Leeds and Hanley Theatres of Varieties, [1904] 2 Ch. 45.

³ Land Securities Co., [1895] 2 Mans. 127.

⁴ Bentinck v. Fenn, [1887] 12 App. Cas. 662.

⁵ Hill's Waterfall & Co., [1896] 1 Ch. 947.

⁶ *Re Vestal Hosiery Co.*, [1922] W. N. 62. The reasons for such a transfer are stated in the case, including that if the case is a lengthy one the fact that the County Court does not sit *de die in diem* inflicts considerable hardship on the parties.

by affidavit (Rule 68). On the return of the summons the Court gives directions for hearing the summons before the Judge in Court, and the manner of taking evidence, which may be oral or by affidavit, or partly in one manner and partly in the other. In the High Court the practice till 1921 was for the applicant to issue a summons; this, if the company is being wound up by or under the supervision of the Court, is an ordinary summons intitled in the winding up, and having the appropriate number; but if the company is in voluntary liquidation, is an originating summons. Upon the return day named in the summons the parties attended before the Registrar, who entered the evidence filed on behalf of the applicant, and, unless the matter was directed to be heard on oral evidence, fixed a date for the respondents to file their evidence in answer, and gave the applicants a certain length of time to reply, or gave directions for taking the evidence orally, as the case might be. During the interval any applications which were necessary might be made by summons for discovery, and interrogatories, liberty to inspect, and liberty to cross-examine deponents on their affidavits, and the like. If the summons as served was not sufficiently specific, the Registrar or Judge ordered further particulars to be delivered; and a summons might be taken out, as in an action, to strike out all or any part of the claim in the original summons, on the ground that no cause of action was disclosed, or that the statement was embarrassing, or that upon the face of the summons it appeared that the claim was barred by the Statute of Limitations.* When the matter was ripe the Registrar fixed a day for the hearing of the summons before the Judge in Court. This practice of trying claims on affidavit evidence has proved very unsatisfactory, and in December, 1921, Astbury, J., and P. O. Lawrence, J., laid down the following rule of practice: "On the return of the summons the Registrar shall give directions as to whether points of claim and defence are to be delivered or not, as to the taking of evidence wholly or in part by affidavit or orally, as to cross-examination, and generally as to the procedure on the summons. No report or affidavit shall be made or filed until the Registrar shall so direct."¹ In February, 1922, P. O. Lawrence, J., ordered the transfer of a motion under Section 215 from the County Court into the High Court and that directions should be obtained from the Registrar as to the further proceedings, intimating that he should direct points of claim with particulars of the charges against the respondent director, points of defence with sufficient particulars to inform the liquidator clearly as to what answer was made to the charges, and

¹ Practice Note, [1921] W. N. 356.

that there should be lists of documents or cross orders for discovery.¹ It is more convenient that in respect of matters in dispute the evidence-in-chief should be given orally rather than on affidavit subject to cross-examination. A misfeasance summons ought to be set down in the witness list as soon as the points of claim, defence, and reply have been delivered.²

By Rule 70 notes of evidence taken at any public examination held under Section 175 may be used, on an application under Section 215, against any of the persons against whom the application is made who was or had the opportunity of being present at and taking part in the examination, provided that fifteen days' notice is given to each of the persons against whom it is intended to use such evidence, specifying the parts intended to be read, and copies of such notes or parts of notes (except notes of the person's own depositions) are furnished, and provided also that every person against whom the application is made shall be at liberty to cross-examine or re-examine (as the case may be) any person the notes of whose examination are read.

It will be noted that the Act makes the notes evidence only against the person examined, while the Rule makes them evidence (subject to the right to cross-examine) against all who might have attended and taken part in the examination. The Court has power to make Rules as to the reception of evidence, and on this ground the Rule in question may be justified.³ *

Security for costs can be obtained in the same circumstances as would give a right thereto in an action,⁴ but the poverty of the liquidator is not a ground for ordering security when he is applicant.⁵

Before 1909 the summons could not, nor could any other similar proceeding in the winding up, be served out of the jurisdiction⁶; but see now Order XI., Rule 8a, of the Rules of the Supreme Court.

ORDER OF APPLICATION OF FUNDS IN WINDING UP.

The secured creditors of a company (debenture holders and mortgagees) can realise their security either under power of sale or by application to the Court, and are outside the liquidation, except so far as any balance remains due after their security is exhausted, for which balance they may prove as unsecured creditors (see page 560, *supra*).

¹ *Re Vestal Hosiery Co.*, [1922] W. N. 62.

² Practice Note, [1922] W. N. 294.

³ See *London and General Bank*, [1894] W. N. 155, 63 L. J. Ch. 853.

⁴ *Howe Machine Co.*, *Fontaine's Case*, [1889] 41 Ch. D. 118. See also *W. Powell & Sons*, [1896] 1 Ch. 168.

⁵ *Strand Wood Co.*, [1904] 2 Ch. 1.

⁶ *Anglo-African Steamship Co.*, [1886] 32 Ch. D. 350; *re Busfield*, [1886] 32 Ch. D. 123; *Westmoreland Slate Co. v. Falden*, [1891] 3 Ch. 15 (the Channel Islands).

They therefore are thus paid, so far as their security extends, in priority even to the costs of liquidation, but this is because the payment is not made as part of the liquidation.

If the liquidator is also receiver for debenture holders or other secured creditors, or if the secured creditors do not take possession of the property charged but allow the liquidator to realise it, he will in the first instance deduct the costs of realisation, including his own remuneration *as receiver*, and then pay over to the parties entitled the moneys realised in respect of the property charged, retaining the balance (if any) to be dealt with in the winding up. If some other person is receiver for the secured creditors, such receiver will be bound to hand to the liquidator the balance after satisfying the rights of the secured creditors and the costs of realisation. It is with this balance alone that the liquidator can deal.

Out of the moneys to be disposed of by the liquidator he must make payments in the following order:—

1. The Costs of Liquidation, including his own remuneration.
2. The Debts having a Priority in Law.
3. The Ordinary Debts.
4. The Balance will be distributable among the contributories.

1. *The Costs of Liquidation.*

(a) *In a Winding Up by the Court.*—By Section 171 in the case of a compulsory liquidation “the Court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the assets of the costs, charges, and expenses incurred in the winding up in such order of priority as the Court thinks just,” and this power is preserved by Rule 187; but in the absence of any such order of Court the priority of the respective costs, charges, and expenses is as set forth in that Rule, the costs of the petition coming first, and the liquidator’s remuneration being postponed to all costs except the expenses of the committee of inspection; and by Section 196 all costs, charges, and expenses properly incurred in a voluntary winding up, including the remuneration of the liquidator, are payable out of the assets in priority to all other claims.

All costs in a compulsory winding up must be taxed, and no payments to persons employed by the liquidator are payable until they have been considered and allowed by the Registrar (Rule 187 [2]). Where in litigation an order has been made that costs shall be paid out of the assets of the company or by the liquidator, with leave to retain them out of the assets, the

amount is payable forthwith, without waiting to see if the funds will be sufficient to pay all costs incurred in the liquidation, and if the liquidator pays such costs he may repay himself at once.¹ It follows that costs ordered to be paid out of the assets come before the general costs of the liquidation.² If there is any danger that the assets will not be sufficient to pay all costs in full, the liquidator should bring the fact to the notice of the Court, which may in its discretion make an order stating how payment is to be made.¹ If the liquidator continues proceedings commenced before the winding-up order, the whole costs, and not only those incurred after the order, are costs of the liquidation and are payable in full.³

The date of the order for payment of costs does not give any priority, but when once the order is made payment may be enforced forthwith unless the order otherwise directs.⁴ Costs of litigation ordered to be paid prior to the commencement of the winding up may be proved as debts and rank for dividend (see page 556, *supra*).

The costs of petition include the taxed costs of any person appearing on the petition whose costs are allowed by the Court (Rule 187). The "usual" order is to give the shareholders supporting one set of costs between them, and the creditors supporting one set of costs between them, except where they appear by the same solicitor as the petitioner, when* they get no costs.⁵ Costs of creditors and contributories supporting or opposing and appearing by the same solicitor are governed by the same rule, but the Taxing Master has discretion to allow separate counsel although the "usual order" has been made.⁶ The costs generally are in the discretion of the Court, and if unfounded charges are made, or the petitioner's conduct is unsatisfactory or his debt small, the order may be made without costs.⁷ The costs of an application to stay an action pending the hearing of the petition stand on the same footing as the costs of petition.⁸

A creditor must bear his own costs of proving his debt unless the Court otherwise orders (Rule 94), and this Rule now applies in every winding up. But the costs of an appeal to the Court

¹ London Metallurgical Co., [1895] 1 Ch. 758; Dominion of Canada Plumbago Co., [1894] 27 Ch. D. 33.

² Staffordshire Gas Co., [1893] 3 Ch. 523.

³ London Drapery Stores, [1899] 2 Ch. 684.

⁴ Cape Breton Co. v. Fenu, [1881] 17 Ch. D. 205; London Metallurgical Co., [1895] 1 Ch. 758.

⁵ Brighton Marine Palace Co., [1897] W. N. 12.

⁶ Silberhutte Supply Co., [1910] W. N. 81.

⁷ Generally as to costs of petition see Ibo Investment Trust, [1904] 1 Ch. 26.

⁸ People's Garden Co., [1876] 1 Ch. D. 44.

are in the discretion of the Court and usually follow the event. The same practice obtains in the case of appeals from the settlement of the list of contributories.

Costs incurred by the company prior to the liquidation are *prima facie* not taxable in the liquidation, but must be referred to the Master in the ordinary course; but if the solicitor claimant has submitted to an order in the liquidation for the delivery of a bill of costs he will be bound to allow the taxation of it to proceed in the winding-up department.¹

(b) *In a Voluntary Winding Up.*—In this case the costs are governed by Section 196, which is as follows:—

196. All costs, charges, and expenses properly incurred in the voluntary winding up of a company, including the remuneration of the liquidator, shall be payable out of the assets of the company in priority to all other claims.

This means “in priority to all other claims” existing at the date of the winding up. If the liquidator, on behalf of the estate, incurs obligations, these must first be paid. Thus, costs of litigation during the liquidation ordered to be paid, whether the order is only for payment or is for payment out of the assets, rank before the liquidator’s own costs or the general costs of winding up, and the same rule applies if the order is for payment by the liquidator, with leave to recoup himself out of the assets,² and this section does not give the liquidator any priority over secured creditors, except in so far as he may be entitled in respect of matters of which the mortgagees have had the benefit,³ e.g. expenses of collecting the estate for them.

If the assets are not sufficient to pay the bill of costs of the solicitor employed in the winding up, the liquidator is not personally liable to him.⁴ But the costs of the liquidation come before the liquidator’s remuneration, and if the assets are not sufficient to pay both in full the solicitor will take priority.⁵ If a voluntary liquidation is continued under supervision, the costs of the solicitor, subsequent to the order, are preferred to the remuneration of the liquidator both before and after the order.⁶

(c) *Whether in a Compulsory or a Voluntary Liquidation.*—In the case of proceedings being taken in the name of the company the Court of First Instance usually orders payment of costs out

¹ *Re Palace Restaurants, Limited*, [1911] 1 Ch. 492.

² *House Investment Co.*, [1890] 14 Ch. D. 167, *Dommon of Canada Plumbago Co.*, [1884] 27 Ch. D. 33; *London Metallurgical Co.*, [1895] 1 Ch. 758; *Pacific Coast Syndicate*, [1913] 2 Ch. 26.

³ *Regent’s Canal Ironworks*, [1876] 3 Ch. D. 411.

⁴ *Trueman’s Estate*, [1872] 14 Eq. 278; *re Massey*, [1870] 9 Eq. 367.

⁵ *Re Massey*, [1870] 9 Eq. 367; *Dronfield Silkstone Co.*, [1881] 23 Ch. D. 511.

⁶ *Sanitary Burial Association*, [1900] 2 Ch. 289.

of the assets, and not by the liquidator personally; but a defendant can apply for security for costs (Section 278). But, whatever the form of the order, such costs take priority over the liquidator's own costs and the general costs of the liquidation.¹ In proceedings in the liquidation where the liquidator is applicant he may, in case of failure, be ordered to pay the costs personally, when the order is usually without prejudice to his right to apply for liberty to retain them out of the assets²; but if the liquidator is respondent and is unsuccessful the usual order is for payment of the costs only out of the assets.³

In case of an appeal the usual order, if the liquidator is appellant and he fails, is that he do pay the costs (*i.e.* personally, whether he get them out of the estate or not⁴); but if he is respondent, only that he do pay them out of the assets.⁵ The liquidator should, therefore, before appealing, seek the leave of the Court, so as to be at least secure that he will be allowed to recoup himself out of the assets. The Court of Appeal will not usually determine whether or not the liquidator is to be recouped, leaving that question to the Judge.⁶

The liquidator is not personally liable to the solicitor employed in the winding up, whether such winding up be compulsory⁷ or voluntary.⁸ The solicitor must look to the assets for payment. He will have a lien on any fund recovered through his instrumentality,⁹ and may obtain a charging order in respect of such lien, or even of a lien accruing before the winding up.¹⁰ He cannot, however, obtain any lien on the file of proceedings or the documents relating thereto,¹¹ nor a lien for a debt existing before the winding up on documents coming into his possession after the commencement of the winding up.¹²

2. *The Debts Having a Priority in Law.*

(a) Under The Companies Act, 1862, it was held that debts due to the Crown took priority over other debts¹³; but the Court of Appeal has now held that under the Act of 1908,

¹ See page 603, note 4, *supra*.

² *Re W. Powell & Sons*, [1896] 1 Ch. 681; *Hounslow Brewery*, [1896] W. N. 45.

³ *Salisbury Jones and Dale's Case* No. 2, [1895] 1 Ch. 333; *London Metallurgical Co* [1895] 1 Ch. 758, *Vau den Hurk's*, *R. Martons & Co.*, [1900] 1 K. B. 850.

⁴ *Cambrian Steam Packet Co.*, [1869] 4 Ch. 112; *Fermo's Case*, [1874] 9 Ch. 355.

⁵ *Salisbury Jones and Dale's Case* No. 2, [1895] 1 Ch. 333.

⁶ *Silver Valley Mines*, [1882] 21 Ch. D. 381.

⁷ *Ex parte Watkin*, [1876] 1 Ch. D. 130; *Dominion of Canada Plumbago Co.*, [1884] 27 Ch. D. 33.

⁸ *Re Trueman's Estate*, [1872] 14 Eq. 278.

⁹ *Re Massey*, [1870] 9 Eq. 367.

¹⁰ *Re Born*, [1900] 2 Ch. 433.

¹¹ *Union Cement Co.*, [1869] 4 Ch. 627.

¹² *Capital Fire Insurance Association*, [1883] 24 Ch. D. 408.

¹³ *Oriental Bank*, [1885] 28 Ch. D. 673; *West London Commercial Bank*, [1888] 38 Ch. D. 364; *Henley & Son*, [1878] 9 Ch. D. 469; *New South Wales Commissioners v. Palmer*, [1907] App. Ca. 179.

except as regards the debts specified in Section 209 (see below), no such priority exists.¹

(b) By Section 209 priority is given to parochial and local rates which have become due and payable within twelve months of the *specified day* (as to which see page 599); assessed taxes, land tax, property and income tax assessed up to the 5th April next *before the specified day*, not exceeding in the whole one year's assessment²; the wages or salary³ of any clerk or servant in respect of services rendered to the company during the four months next *before the specified day*, not exceeding fifty pounds; and the wages of any labourer or workman, not exceeding twenty-five pounds, in respect of services rendered to the company during two months *before the specified day*, with a special provision in case of labourers in husbandry entitled to a lump sum at the end of the year receiving a due proportion.

The words "clerk or servant" do not include a managing director,⁴ but include a servant in respect of his wages as servant, although he be also a director: e.g. the editor of a newspaper published by the company, but not mere contributors to the paper.⁵ It includes a secretary, in the ordinary course, but not one who has other employment and performs his duties through clerks.⁶ In the case cited the secretary failed in his claim, the judge saying that he "did not exactly serve the company but provided services, attending himself occasionally when required." The fact that a man is not working under the control and subject to the commands of the employer is probably sufficient to establish that he is not a clerk or servant and this has been held to be so if in addition he is working away from the employer's place of business, is not exclusively employed on his business, and is only bound to do a particular class of business.⁷ Under a special contract a singer in opera has been held to be a servant.⁸ A chemist employed at a weekly wage to prepare formula is included.⁹

Payments under The Workmen's Compensation Act, 1906, as amended by The Workmen's Compensation Act, 1923 (see particularly Section 19 and the First Schedule), the amount of which became

¹ H. J. Webb and Co., [1922] 2 Ch. 369, affirmed *sub* Food Controller v. Cork, [1923] A. C. 647.

² If the liquidator fails to pay income tax due by the company he will be personally liable (New Zealand Joint Stock Corporation, [1907] 23 Times L. R. 238).

³ "Salary" includes commission to a traveller (*re* Klein, [1906] W. N. 148; Earle's Shipbuilding Co., [1901] W. N. 78).

⁴ *Hopkinson v. Newspaper Proprietary Syndicate*, [1900] 2 Ch. 249.

⁵ *Re Beeton & Co., Limited*, [1913] 2 Ch. 279.

⁶ *Manney v. Buck*, [1906] 2 K. B. 745.

⁷ *Ashley v. Smith*, [1918] 2 Ch. 378, a case of outside contributors to a newspaper.

⁸ *Re Winter Garden German Opera*, [1907] 23 Times L. R. 662.

⁹ *Re G. H. Morrison & Co.*, [1911] 106 L. T. 731.

due or the liability wherefor accrued before the commencement of the winding up, are also made preferential by Section 5 of that Act as so amended,¹ and Section 209, Sub-section 1 (d), of the Companies Consolidation Act.² The limitation to one hundred pounds in any individual case is abolished (Workmen's Compensation Act, 1923, Section 19, Sub-section 2). By virtue of The Unemployment Insurance Act, 1920, Section 26, Sub-section (1), and The National Health Insurance Act, 1924, Section 106, Sub-section (1), there are to be included in the debts made preferential by Section 209 all contributions payable by the company under those Acts in respect of employed persons and employed contributors respectively during the four months before the commencement of the winding up or the winding-up order. These provisions do not apply if the company is being wound up voluntarily for the purpose of reconstruction or amalgamation.

All the above-mentioned liabilities rank equally (Sub-section 2). These payments also have a preference in England or Ireland over the claims of holders of debentures or debenture stock under a floating charge created by the company, which preference attaches both in a winding up and when a receiver or manager is appointed, either by the Court or the debenture holders,³ or possession taken on behalf of the debenture holders⁴ (Section 107 and Section 209, Sub-section 2; Workmen's Compensation Act, 1923, Section 19, Sub-section 1 (b) and First Schedule).⁵

The *specified day* referred to in Section 209 is, in the case of a compulsory order being made where the company is not already

¹ If the amount is payable weekly the sum due for the purposes of this provision will be the amount at which such weekly sum could be redeemed. If the company was insured against liability under the Act the benefit of the insurance passes to the injured workman (Workmen's Compensation Act, 1906, Section 5, Sub-section 1; Workmen's Compensation Act, 1923, Section 19, Sub-section 1 (a)), and he has no claim in the bankruptcy or liquidation of the employer except where the insurance does not cover the whole of the employer's liability (*Burrows v. Petrick, Dix & Co.*, [1915] 1 Ch. 20). As to the mode of estimating the sum payable see *re Law Car and General Insurance Co.*, [1914] 110 L. T. 27.

² The assessment of the amount Judge sitting as arbitrator under payment is a matter for the Court [1912] 2 K. B. 303).

³ *in re Dring's, Limited*, [1909] W. N. 100.

⁴ After a sale by a trustee of the debenture trust deed the amount payable for rates was declared a charge upon the purchase money in priority to the claim of the debenture holder, who was ordered to repay the amount which had been paid to him (*Westminster Corporation v. Chapman*, [1916] 1 Ch. 161).

⁵ "Any payments made under this section shall be recouped as far as may be out of the assets of the company available for payment of general creditors" (Section 107, Sub-section 3). The right of recoupment is confined to payments made in respect of debts of the company due before the receiver goes into possession, including rates payable in advance (*Mannesmann Tube Co.*, [1901] 2 Ch. 93). Although The Unemployment Insurance Act, 1920, and The National Health Insurance Act, 1924, do not, like The Workmen's Compensation Act, 1923, expressly bring in Section 107, the inclusion in the two former Acts of the contributions in the debts made preferential by Section 209 appears to make Section 107 applicable.

in liquidation, the date of the winding-up order, and in any other case (*i.e.* either the case of a liquidation wholly voluntary, or a liquidation continued under supervision, or a voluntary liquidation converted into a compulsory winding up) the date of the commencement of the winding up. This has been held to be the date of the commencement of a voluntary winding up, whether there is a subsequent compulsory order or not.¹ The critical day under The Workmen's Compensation Act, 1923, is the commencement of the winding up in all cases; and under The Unemployment Insurance Act, 1920, and The National Health Insurance Act, 1924, the commencement of the winding up or the winding-up order—probably intended to indicate the same day as that specified in Section 209. Where the company is not in liquidation, the specified day is the date of the appointment of the receiver or of possession taken (Section 107, and Workmen's Compensation Act, 1923, First Schedule, Clause 3 (c)).

Miners' wages in the Stannaries up to three months are also given a priority, and the right of clerks and servants in the Stannaries to priorities is confined to three months (Section 240).

The preferential payments, subject to the retention of sufficient moneys to meet the costs of liquidation, are payable forthwith so far as the assets suffice (Section 209, Sub-section 3), but in case of a deficiency they abate in equal proportions (Sub-section 2).

If a receiver (or *seemle* a liquidator) disposes of the assets without making provision for the payments entitled to preference he is personally liable in damages to the claimant for the amount which he would have received if the assets had been properly administered,² and moneys paid to a debenture holder can be recovered to make the necessary payments.³

If a landlord has distrained within three months before the date of the winding-up order,⁴ the above preferential payments are a first charge on the goods or effects distrained on or the proceeds of sale, but the landlord becomes entitled to the same rights of priority as the person to whom the payment is made (Sub-section 4).

The order appointing a receiver always directs him to pay the claims entitled to preference under Section 107 "forthwith."

These are the only priorities recognised by law, and these priorities are only in the liquidation, so that, except so far as Section 107, above referred to, gives priority over floating charges, there is no priority over the claims of mortgagees or debenture holders, who are outside the liquidation.⁵

¹ *Re Havana Exploration Co.*, [1916] 1 Ch. 8.

² *Woods v. Wmskill*, [1913] 2 Ch. 303.

³ *Westminster Corporation v. Chapman*, [1916] 1 Ch. 161.

⁴ There is no similar provision as to a voluntary winding up.

⁵ *Richards v. Overseers of Kidderminster*, [1800] 2 Ch. 212.

3. *The Ordinary Creditors.*

These are paid *pari passu*, the debts ranking for payment being those specified at page 550 *et seq.*, *supra*. A contributory who is also a creditor is not entitled to payment until his calls are paid (see page 558, *supra*), but when all calls are paid he is not to be postponed to other creditors.¹ The method of arriving at his right to receive anything is stated on page 559, *supra*. No sum due to a contributory in his character of a member by way of dividends, profits, or otherwise is to be deemed a debt so as to compete with the debts of other creditors who are not members of the company (Section 123, Sub-section 1 (vii.)). So that, although while a company is a going concern a dividend which has been declared is a debt from the company, it is only payable in a liquidation if all the creditors have been satisfied.²

When the liquidator has collected sufficient money and can estimate the liabilities and costs of liquidation he will make a distribution among the creditors by way of dividend. He will of course only do this when satisfied that the balance he retains will be ample to meet the costs of liquidation, including those of any possible litigation; and he will calculate the amount of the dividend with regard to all the claims of which he has knowledge.

Creditors whose claims are barred by the Statute of Limitations are not entitled to payment, even if the liquidator is willing to pay them.³

Where a debt had been assigned, under the old practice notice to the liquidator was sufficient to perfect the assignment;⁴ but now the assignee cannot in a compulsory liquidation get an order for payment direct to himself; he must tender a new proof.⁵ Money in the hands of the liquidator available for payment of a debt could under the old practice be attached under a garnishee order.⁶ But it was held under the Bankruptcy Acts that a dividend in the hands of the trustee in bankruptcy cannot be so attached,⁷ and it seems the same rule will now apply in a liquidation. Money paid into the Companies Liquidation Account cannot be thus attached.⁸

4. *Distribution of Surplus among Contributories.*

When the debts and costs of liquidation are paid in full the surplus assets belong to the contributories. Section 170 provides that "the Court shall adjust the rights of the contributories

¹ *Re West of England Bank, ex parte Brown*, [1879] 12 Ch. D. 823, *ex parte Welton*, [1899] 1 Ch. 108.

² *W. J. Hall & Co., Limited*, [1909] 1 Ch. at page 527.

³ *Fleetwood and District Electric Light Syndicate*, [1915] 1 Ch. 486.

⁴ *Wragge's Case*, [1867] 5 Eq. 284.

⁵ *Re Frost*, [1899] 2 Q. B. 50.

⁶ *Ex parte Turner*, [1890] 2 De G. F. & J. 354; explained in *Spence v. Coleman*, [1901] 2 K. B. 199.

⁷ *Prout v. Gregory*, [1890] 24 Q. B. D. 281.

⁸ *Spence v. Coleman*, [1901] 2 K. B. 199.

among themselves, and distribute any surplus among the persons entitled thereto," and this power is not transferred in a compulsory winding up to the liquidator: accordingly an order of Court is required for any distribution. In an unreported case, where, after a lengthy winding up, all the creditors had been paid, but assets remained to be realised, the creditors on the committee of inspection resigned and contributories were appointed in their places, and this arrangement was confirmed by Wright, J.

In a voluntary liquidation the liquidator adjusts the rights of the contributories without reference to the Court (Section 186, i. and ii.).

The balance, after payment of the company's liabilities, is distributable among the contributories of the company in accordance with their rights under the Memorandum and Articles of Association of the company, a shareholder who has not paid calls due from him being required to pay what is due from him before participating, although, if it appear that he will receive more than he is liable to pay, the matter may be dealt with in account without requiring payment or repayment.¹

Where there are shares having a preference as to capital the amount paid on those shares must be repaid before any amount is paid to those whose rights are deferred—that is to say, the ordinary and deferred or founders' shares; and the provisions of the Memorandum and Articles must be strictly followed. If, however, these do not contain any special provisions in relation to the distribution of the surplus assets, the shareholders all rank equally among themselves, even though some of the shares are preferential as to dividend—that is to say, if the same amount is paid up on all the shares, the assets are distributed rateably according to the number of shares held by each member; but if more is paid up on some shares than on others, the surplus assets must first be applied in repaying to those who have paid the greater sum the excess they have paid over the others, and then the balance (if any) divided equally.² This will have the same effect as if all the moneys unpaid on the shares were collected and the whole assets, including these amounts, were divided among the members in proportion to the capital held by them. It may sometimes be necessary to make a call upon those who have paid the less amount, in order to repay to those who have paid the greater such a sum as will produce

¹ *Re West Coast Goldfields*; *ex parte Rowe* [1906] 1 Ch. 1; and *Grissell's Case*, [1860] 1 Ch. 528.

² *Exchange Drapery Co.*, [1888] 38 Ch. D. 171; *Wakefield Rolling Stock Co.*, [1892] 3 Ch. 165.

an equality.¹ Money paid in advance of calls is repayable with interest before the ordinary capital is paid to the shareholders.²

A shareholder cannot participate in the distribution of assets until he has paid all calls due from him.³

If the capital is not exhausted by repaying to the shareholders the capital paid up, the balance is, in the absence of express provision, divisible among the shareholders in proportion to the nominal amount of share capital held by them respectively, and not in proportion to the amount paid up on their shares,⁴ and where there has been a reduction of capital the shares only rank at the reduced amount.⁵ If preference shareholders are declared to be entitled to a return of their capital in a winding up before any payment is made to the ordinary shareholders, and no more is said, it is not clear whether they are entitled to any further participation in the surplus assets, the cases being conflicting.⁶ It is submitted that in the absence of express words giving them further rights they are only entitled to repayment of their capital.

These are the general principles. The varieties, however, introduced by the terms of the Memorandum or the Articles of Association are numerous, and effect must be given to the provisions interpreting them as in the case of any other deed. The Articles frequently refer to "the surplus assets." These words *prima facie* mean the fund available after payment of the debts and costs of liquidation of the company,⁷ but the context may show that they mean the amount remaining after

¹ *Ex parte Maude*, [1871] 6 Ch. 51. If the Articles state that the loss is to be borne in proportion to the amount paid, or which ought to have been paid, on the shares held by the members at the commencement of the winding up, the liquidator must make such calls as will make all the shares paid up to the same extent, and the assets will then be divisible proportionately to the number of shares held (*Anglo-Continental Corporation*, [1898] 1 Ch. 327), for "capital paid" includes what is to be paid in the liquidation (*ex parte Lowenfeld*, [1894] 70 L. T. 3; see also *Welsh Whisky Distillery Co.*, [1900] W. N. 59). But an Article providing that the loss is to be borne by the members in proportion to the capital paid up, or which ought to have been paid up, at the commencement of the winding up, on the shares held by them respectively, excludes the principle laid down in *ex parte Maude* (*supra*), and in such a case the liquidator cannot make calls for the purposes of equalisation (*Kinfaun (Horneo) Rubber*, [1923] 1 Ch. 124).

² *Wakefield Rolling Stock Co.*, [1892] 3 Ch. 165.

³ *Grissell's Case*, [1866] 1 Ch. 528.

⁴ *Birch v. Cropper*, [1880] 14 App. Ca. 525; *Wakefield Rolling Stock Co.*, [1892] 3 Ch. 165.

⁵ *Espuela Land and Cattle Co. No. 2*, [1909] 2 Ch. 187.

⁶ *Espuela Land and Cattle Co. No. 2*, [1909] 2 Ch. 187, *per Swinfen Eady, J.*; *Fraser and Chalmers, Limited*, [1919] 2 Ch. 579, *per Astbury, J.*; and *Anglo-French Music Co.*, [1921] 1 Ch. 386, *per Eve, J.*, favour the right to further participation; *National Telephone Co.*, [1914] 1 Ch. 755, *per Sargant, J.*, is against the right. Compare *Will v. United Lankat Plantations Co.*, [1912] 2 Ch. 571, [1914] App. Ca. 11, where it is pointed out that each case will depend on the words used and that decided cases are of little help in interpreting a different set of words.

⁷ *Crichton's Oil Co.*, [1902] 2 Ch. 86; *Odessa Waterworks*, [1901] 2 Ch. 190 note.

also repaying the paid-up capital on all the shares.¹ If the shares are of different amounts, and the surplus is divisible without regard to the amount of the shares, the presumption, in the absence of express words, is that this means the surplus after repaying capital as well as debts.² If the surplus assets are to be distributed between the members "in proportion to their shares," this means the nominal amount of their shares, and not the amount paid up³; but "in proportion to the capital paid" has not this meaning.⁴ The words "in proportion to the capital paid up on the shares held by them at the commencement of the winding up" mean in proportion to the nominal amount of the shares, for the liquidator should call up the balance to adjust the rights of the contributories.⁵ If it is desired to make the proportion depend on the state of things at the time of the liquidation, the words should be "in proportion to the amounts paid up at the commencement of the winding up on the shares held by them respectively."

If after the payment of the debts of the company and the costs of the liquidation any part of the reserve fund remains unexhausted, it does not follow that it is to be divided in the same way as dividends would be paid. Unless the Articles otherwise provide—*e.g.* if shareholders are only entitled to participate in dividends which have been declared—it will fall into and form part of the surplus assets,⁶ though the Articles may be such as to give such profits⁷ to one class of shareholders,⁸ and a surplus arising from the sale of the company's undertaking is not divisible profit for the purpose of paying arrears of preference dividend⁹; but if the Articles expressly give the ordinary shareholders the right to all profits after a fixed dividend has been paid to the preference shareholders, and the full preference dividend has been paid, the reserve fund goes to the ordinary shareholders¹⁰; and if the preference shareholders are entitled to the profits, whether

¹ *Re New Transvaal Co.*, [1896] 2 Ch. 750; *re Peabody Gold Mining Co.*, [1897] W. N. 170.

² *Ramel Syndicate, Limited*, [1911] 1 Ch. 749.

³ *Driffeld Gas Light Co.*, [1898] 1 Ch. 451.

⁴ *Mutoscope Syndicate*, [1899] 1 Ch. 896. This case is difficult to distinguish from the *Anglo-Continental Corporation*, [1898] 1 Ch. 337. Wright, J., in his judgment appears not to have cited the whole of the Article.

⁵ *Ex parte Lowenfeld*, [1894] 70 L. T. 3; *Provision Merchants' Co.*, [1872] 26 L. T. 862; *Anglo-Continental Corporation*, [1898] 1 Ch. 317.

⁶ *Crichton's Oil Co.*, [1902] 2 Ch. 86; *Odessa Waterworks*, [1901] 2 Ch. 190 note.

⁷ They would not be profits for the purposes of super tax (see page 418, *supra*).

⁸ *Bishop v. Smyrna and Cassaba Railway No. 1*, [1895] 2 Ch. 205. But see *Crichton's Oil Co.*, [1902] 2 Ch. at page 95.

⁹ *Espuela Land and Cattle Co. No. 2*, [1909] 2 Ch. 187.

¹⁰ *Bridgewater Navigation Co.*, [1891] 2 Ch. 317.

dividends are declared or not, any undivided profits must be applied first in paying arrears of their dividend, but there is a difference of judicial opinion how far a provision that they are entitled in the winding up to arrears of the preferential dividend gives them a right to anything beyond the undivided profits.¹ Profits earned after the commencement of the winding up are divisible as capital.²

CRIMINAL PROSECUTIONS.

In a compulsory winding up or winding up under supervision, "if it appears to the Court in the course of a winding up by or subject to the supervision of the Court that any past or present director, manager, officer, or member of the company has been guilty of any offence in relation to the company for which he is criminally responsible, the Court may on the application of any person interested in the winding up, or of its own motion, direct the liquidator to prosecute for the offence, and may order the costs and expenses to be paid out of the assets of the company" (Section 217, Sub-section 1). In a voluntary winding up the liquidator is empowered, "with the previous sanction of the Court," similarly to prosecute, "and all expenses properly incurred by him in the prosecution shall be payable out of the assets of the company in priority to all other liabilities" (Section 217, Sub-section 2).

Prosecutions have been ordered under these sections.³ The principles on which the Court will act were considered by Buckley, J., in the London and Globe Finance Corporation case,⁴ where he laid down that a prosecution would be ordered when the circumstances were such that an honest and upright man desirous as a good citizen of doing his duty by the State would feel that he ought at his own expense to institute a prosecution.

The crimes for which a prosecution may be ordered are any offences criminally punishable committed "in relation to the company."

The offences specially dealt with in regard to companies are those referred to in Section 216 (destroying, mutilating, altering, or falsifying any books, papers, or securities, or making or being privy to making any false or fraudulent entry in any register, book of account, or document belonging to the company with intent to deceive or defraud any person); Section 281 (wilfully

¹ See page 29, *supra*.

² *Bishop v. Smyrna and Cassaba Railway No. 2*, [1895] 2 Ch. 506.

³ *Mercantile Marine Insurance Co., per North, J.*, [1882]; *re Denham & Co., per Chitty, J.*, [1884] W. N. 122. Leave was refused in *Empion Fuel and Gas Co.*, [1875] W. N. 10, though the defendants were subsequently convicted (*Reg. v. Aspinall*, [1877] 2 Q. B. D. 48).

⁴ [1903] 1 Ch. 730.

making a statement false in any material particular, knowing it to be false, in any return, report, certificate, balance sheet, or other document required by or for the purposes of the Act specified in the Fifth Schedule); and Sections 81 to 84 of The Larceny Act, 1861 (fraudulently taking or applying to his own use property of a public company, keeping fraudulent accounts, destroying or mutilating books, or making or concurring in making false entries, or omitting or concurring in omitting material entries in books of account or other documents, and making, circulating, or publishing any written statement or account known to be false in any material particular, with intent to deceive or defraud¹ any member, shareholder, or creditor, or with intent to induce any person to become a shareholder, or to entrust or advance property, or to enter into any security for the benefit of the company).

If proof is given that there is probable cause for believing that a contributory is about to abscond, or to remove or conceal his goods for the purpose of evading payment of calls, or of avoiding examination respecting the affairs of the company, the Court may cause him to be arrested, and his books, papers, money, and goods seized and kept (Section 176). This power has been used to keep a director, who was also a contributory, from absconding, and it has been used for seizing property without arresting the person.²

There are very many penalties under the Act for default in complying with its provisions. Section 276 declares that all offences under the Act made punishable by any fine may be prosecuted under the Summary Jurisdiction Acts: *i.e.* in a Police Court or Petty Sessional Court. In Scotland prosecutions for a number of offences specified in Section 276 must be at the instance of the Lord Advocate or a procurator fiscal as the Lord Advocate may direct.

Fines may be applied in or towards payment of the costs of the prosecution or in or towards rewarding the informer (Section 277.)

DISSOLUTION.

In a compulsory winding up Section 172 provides that "when the affairs of the company have been completely wound up, the Court shall make an order that the company be dissolved from the date of the order, and the company shall be dissolved accordingly."

¹ "To deceive is by falsehood to induce a state of mind, to defraud is by deceit to induce a course of action"; "to defraud is . . . by deceit to induce a man to act to his injury" (*per* Buckley, J., *London and Globe Finance Corporation*, [1903] 1 Ch. 732, 733).

² *Imperial Mercantile Credit Co.*, [1868] 5 Eq. 264.

The order must be reported by the liquidator to the Registrar of Companies (under penalty of five pounds a day), who makes a minute in his books accordingly (Section 172, Sub-sections 2 and 3). The order may, it seems, be made even in the case of a company incorporated by Act of Parliament, showing an intention that it should continue in perpetuity.¹

In a voluntary winding up the dissolution takes effect three months after the registration of the Return of the Final Winding-Up Meeting, as stated on page 537, *supra*. As to setting aside a dissolution see page 538, *supra*.

AFTER DISSOLUTION.

When a company is finally dissolved the Court has no longer any jurisdiction to reach it, for there is no company,² and it has no officers or other agents who can be served with notices or writs on behalf of the company; but it has not infrequently happened that there were persons who had grievances or claims which they desired to enforce, and in the case of voluntary liquidations, where the dissolution was entirely the act of the liquidator, it was sometimes argued that in a voluntary winding up, inasmuch as the final meeting is only to be held "as soon as the affairs of the company are fully wound up" (Section 195), the dissolution would not take place if in fact there was property not disposed of or liabilities not dealt with. This contention was, however, disposed of in the Court of Appeal,³ and the words cited must be read with the qualification "as far as the liquidators can wind them up."

Under the old law a dissolution could not be re-opened "except in the case of absolute fraud—fraud with which the company could be fixed." "If there were a case of that kind, then very likely the whole thing might be set aside: that is to say, it might on proper proceedings being taken be made clear that the whole winding up was null and void, and then the company would be restored again to its position, subject to the claims of creditors and contributories"⁴; but, as stated on page 538, *supra*, the Court has now power to re-open a dissolution at any time within two years after it has been effected.

¹ Bradford Navigation Co., [1870] 10 Eq. 331, 5 Ch. 600.

² Weathourne Grove Drapery Co., [1879] 27 W. R. 37, 39 L. T. 30.

³ Pinto Silver Mining Co., [1878] 8 Ch. D. 273; London and Caledonian Marine Insurance Co., [1879] 11 Ch. D. 141.

⁴ *Per* James, L. J., London and Caledonian Marine Insurance Co., [1879] 11 Ch. D. 141. What the "proper proceedings" would be are not indicated. The Lord Justice also suggested that before the dissolution a creditor might "take proceedings to obtain an injunction to prevent the completion of the winding up and the dissolution of the company."

The Court also has power after the final meeting has been called, but before the lapse of three months, to defer the date of the dissolution (Section 195, Sub-section 4). This renders unnecessary the former practice of presenting a petition for compulsory liquidation, or obtaining an order to stay the winding up, to which resort was had to prevent a dissolution becoming effective while claims were pending or property remained undistributed.¹

If there is an effective dissolution, either by order of the Court under Section 172, or by the lapse of three months from the final meeting in a voluntary winding up, and the Court does not within two years set aside the dissolution, claims by the company against other persons vest in the Crown,² there being no longer a company to enforce them; but if before the dissolution the right of action has been assigned, either expressly or by an assignment of "all the assets of the company," the assignee will in some cases be able to enforce the claim by an action brought in his own name. Section 157 of the Act of 1862, which gave to a person taking an assignment of a chose in action, in pursuance of the Act, a right to sue in his own name, is not reproduced in the Consolidation Act. The assignee can therefore only sue in his own name if he can show that before the Judicature Act he could have sued in equity without joining the assignor (i.e. in case of a purely equitable debt which could not be recovered at law), or can bring himself within Section 25, Sub-section 6, of The Judicature Act, 1875: i.e. where there has been an absolute assignment in writing, not purporting to be by way of charge only, "of any debt or other legal chose in action" of which express notice in writing has been given to the debtor.³ In this section of the Judicature Act "legal chose in action" includes the right to enforce contracts—e.g. for the supply of goods—and if the conditions above mentioned are satisfied the assignor of such a contract need not be joined,⁴ and it seems that unliquidated damages for the breach of contracts can also be recovered without joining the assignor if the contract is one of which a Court of Equity would grant specific performance,⁵ but

¹ *Re Eastern Investment Co.*, [1905] 1 Ch. 352.

² *Re Higginson & Dean*, [1890] 1 Q. B. 325.

³ The notice may be given after the death of the assignor (*Walker v. Bradford Old Bank*, [1884] 12 Q. B. D. 611), and therefore, it would seem, after the dissolution of the assigning company.

⁴ *Tolhurst v. Associated Portland Cement Manufacturers*, [1903] App. Ca. at pages 420 to 424.

⁵ *Torkington v. Magee* (Div. Ct.), [1902] 2 K. B. 427, where the matter was fully discussed. The point was not considered in the C. A., [1903] 1 K. B. 604.

not unliquidated damages for torts.¹ The words "not purporting to be by way of charge only" will prevent a charge in debentures being sufficient to carry the right to sue, but an assignment in a trust deed expressed to be absolute, coupled with a proviso for redemption, would suffice.²

If a company is lessee under a lease, the dissolution of the company brings the lease to an end and the land reverts to the lessor, persons who have guaranteed the rent being relieved from liability,³ but if a third party had a beneficial interest in the lease at the time of the dissolution of the company the reversioner takes the interest which reverts to him as trustee for the beneficial owner, and the Court will make a vesting order to give effect to this right.⁴ Where a company was registered under the Land Transfer Acts, 1875 to 1879, as proprietor with a possessory title under an underlease and was dissolved the Court at the instance of the original lessee made an order to close the register.⁵

In like manner when, as a result of the dissolution, there is no company to be sued, claims against the company will fail, and proceedings commenced before the dissolution but not ready for hearing become ineffective⁶; but if the case is ripe for hearing before the company is dissolved, and by reason of the state of business of the Court is not heard until after the dissolution, relief can be given as if the company were not dissolved⁷; but in such a case it would seem that in future the proper course will be to apply to the Court to defer or set aside the dissolution under Section 195 or 223.

When a company in voluntary liquidation has been dissolved no petition for its compulsory liquidation can be effective, for there is no longer any company to wind up,⁸ unless the petition was ready for hearing before the lapse of the three months which caused the dissolution to take effect.⁹

After dissolution no proceedings can be taken under Section 215 against the directors or officers for misfeasance.⁹

¹ *May v. Lane*, [1895] 61 L. J. Q. B. 236, *Dawson v. Great Northern and City Railway*, [1905] 1 K. B. 270. As to what choses in action fall within the rule see the notes to the Judicature Act, 1873, Section 25, Sub-section 6, in the Annual Practice.

² *Hughes v. Pump House Co.*, [1902] 2 K. B. 190; *Tancred v. Delagoa Bay Railway*, [1889] 23 Q. B. D. 239; *Comfort v. Betts*, [1891] 1 Q. B. 737; *re Bell*, [1890] 1 Ch. 1.

³ *Hastings Corporation v. Letton*, [1908] 1 K. B. 378.

⁴ *Re Albert Road, Norwood*, [1916] 1 Ch. 289.

⁵ *C. & C. Tuff v. Registrar of Land Registry*, [1918] W. N. 26.

⁶ *Salton v. New Beeston Cycle Co.*, [1900] 1 Ch. 43.

⁷ *Whiteley's Exerciser v. Gamage*, [1898] 2 Ch. 405; *Crookhaven Mining Co.*, [1866] 3 Eq. 69.

⁸ *Puerto Silver Mining Co.*, [1878] 8 Ch. D. 273; *London and Caledonian Marine Insurance Co.*, [1879] 11 Ch. D. 140; *Schooner Pond Coal Co.*, [1888] W. N. 70.

⁹ *Coxon v. Gorst*, [1891] 2 Ch. 73.

A creditor, however, has a remedy in damages against the liquidator if, with knowledge of the existence of a debt, he has wilfully or negligently distributed or parted with the assets and caused the dissolution of the company without providing for such debt.¹

A solicitor who continues to represent a company after it has been dissolved is liable to the opposing party for costs incurred by reason of the solicitor having held himself out as having authority to act for the company.²

Any personal property which after dissolution is discovered to exist belongs to the Crown as *bona vacantia*. Whether this rule applies to leaseholds and chattels real is not clear: there are conflicting dicta.³ If the property consists of debts from third parties the debts are not extinguished, but are payable to the Crown,⁴ unless previously to the dissolution they have been assigned to a purchaser. There is still a question to be argued as to the effect of real estate being outstanding in trustees⁵: if vested in the company, land would pass to the Crown by escheat on dissolution of the company.

In regard to assets other than things in action, if a company before dissolution has agreed to sell any of its property and has received the purchase consideration, but has not actually effected an assignment, it is no doubt, so long as it continues to exist, a trustee for the purchaser. If, however, the company is dissolved without completing the assignment, there is a question whether or not the Court can make an order vesting the property in the purchaser. Farwell, J., in England, and O'Connor, M. R., in Ireland, have held in the case of leaseholds that such an order can be made,⁶ and Warrington, J., has followed this ruling⁷; while Buckley, J., in the case of letters patent, has held that the Court has no jurisdiction to make the order, and that the property vests in the Crown,⁸ and Romer, J., also in the case of letters patent, has held that the Court has jurisdiction to make the order.⁹ Until a case is taken to the Court of Appeal no certainty will exist on the point.

¹ London and Calcutta Marine Insurance Co., [1879] 11 Ch. D. 144; Pulsford v. Devenish [1903] 2 Ch. 625; Argyll's, Limited v. Coxeter, [1913] 29 T. L. R. 355.

² Sutton v. New Beeston Cycle Co., [1900] 1 Ch. 43.

³ See Hastings Corporation v. Lotton, [1908] 1 K. B. 378; and, on the other hand, Pryce Jones v. Williams, [1902] 2 Ch. 517, and re Bond, [1901] 1 Ch. 18.

⁴ Re Higginson & Dean, [1899] 1 Q. B. 325.

⁵ See re Bond, [1901] 1 Ch. 18.

⁶ Re General Accident Assurance Corporation, [1904] 1 Ch. 147; re Richard Mills & Co., [1905] W. N. 36; Queenstown Dry Docks Co., [1918] 1 L. R. 356. See also C. and C. Taft, Limited, v. Registrar of Land Registry, [1918] W. N. 26, 34 T. L. R. 205.

⁷ Re 9 Bonmore Road, [1906] 1 Ch. 359, where it appears that Mahns, V. C., made a similar order in 1880 in regard to freeholds. Compare King of Hanover v. Bank of England, [1889] 8 Eq. 350.

⁸ Re Taylor's Agreement Trusts, [1904] 2 Ch. 737.

⁹ Dutton's Patent, *in re*, [192] 1 W. N. 64.

ABORTIVE AND DEFUNCT COMPANIES.

Companies which have never commenced operations, or have ceased to carry on business, and have no assets to divide, are frequently disposed of without a winding up, under the provisions of Section 242, which provides that where the Registrar has reasonable cause to believe that a company is not carrying on business or in operation he shall send to the company a letter of inquiry. If he does not within a month receive an answer, he is, within fourteen days, to send a second letter by registered post, and if to this he does not receive a reply that the company is carrying on business, he may publish in the *Gazette* and send to the company by post a notice that at the expiration of three months the name of the company will be struck off the Register and the company dissolved. At the expiration of this period the name is struck off and the company dissolved¹; but the liability (if any) of every director, managing officer, and member continues, and may be enforced as if the company had not been dissolved.²

Further, by Sub-section 4, where a company is being wound up, if the Registrar has reasonable cause to believe that no liquidator is acting, or that the affairs of the company are fully wound up, and the proper returns have not been made by the liquidator for six months after notice demanding the returns has been sent to the registered address of the company, or to the liquidator at his last known place of business, the provisions of Section 242 apply, and the company's name may be struck off the Register with the same results.

Any company,³ member, or creditor aggrieved by this proceeding may by petition apply to the Court in which the company is liable to be wound up, and the Court, if satisfied that the company was carrying on business or in operation when struck off,⁴ or that it is otherwise just so to do, may order its restoration to the Register, whereupon it shall be deemed to have continued in existence as if its name had never been struck off (Section 242, Sub-section 6). The Registrar of Companies should be made a respondent, and the costs are usually made payable by the applicant, even if he is a creditor in no way to blame.⁵ The company must be made co-petitioner with the applicant so that it may give the usual

¹ In 1923 in England and Wales, 1593 companies were in this manner removed from the Register, as against 8008 registered and 2859 wound up during the year.

² This liability continues after the company is restored to the Register unless the Court makes an order under Section 212, Sub-section 6, relieving them (*Brown, Bayley's Steel Works*, [1905] 21 *Times L. R.* 374).

³ *R. Conrad Hall & Co.*, [1916] *W. N.* 275.

⁴ While a voluntary liquidation is proceeding the company is "in operation" for that purpose (*Outlay Assurance Society*, [1887] 34 *Ch. D.* 479).

⁵ *Newfoundland and Canadian Trust, cor. Buckley, J.*, 27th January, 1903.

undertaking to make the returns which have been omitted, upon which, of course, the appropriate fees must be paid.¹ A person who is suing the company for the rescission of an agreement has no *locus standi* to oppose its restoration to the register.² In a Scotch case the Court made the costs of the Registrar a first charge on the assets.³ The practice is also to require that all returns to the Registrar which have been omitted shall be made, and the appropriate fees paid.

The Court has no power to impose a penalty on the company as a condition of restoring it to the Register.⁴

It sometimes happens, when the company has not gone to allotment, that the subscribers to the Memorandum desire dissolution, in which case, upon a memorial, signed by the subscribers, stating that the company is not carrying on business, being lodged with the Registrar, he will (unless he should consider the company ought to be wound up by special resolution) issue the proper notices, and in due course dissolution will take place.

Before the Act of 1900 if any unpaid creditor was dissatisfied at the removal of the company's name his proper remedy was to petition for a winding-up order,⁵ but he may now apply in the same manner as a member (Section 242, Sub-section 6).

¹ Walter Wright, *in re*, [1923] W. N. 128.

² *Re* Conrad Hall & Co., [1916] W. N. 275.

³ Healy Petitioner, [1903] Court of Sess., 5 F. 644.

⁴ Brown, Bayley's Steel Works, [1905] 21 Times L. R. 374.

⁵ Anglo-American Exploration Co., [1898] 1 Ch. 100.

CHAPTER V.

RECONSTRUCTION OF A COMPANY.

RECONSTRUCTION of companies has been common, the process known by this name being a sale of the undertaking of the existing company to a new company. The object is most commonly to raise fresh capital, which is effected by issuing partly paid shares in the new company in exchange for the fully paid shares of the old company and calling up the balance on the new shares; but reconstruction is also resorted to for the purpose of amalgamating two or more companies, or taking new powers in the Memorandum, or re-arranging the capital of the old company, or effecting compromises with creditors by inducing them to take shares or debentures extending over years in place of their claims as creditors, and occasionally a very prosperous company reconstructs so as to give its members two or more shares for every share already held by them. The large increase in stamp duties, both on the capital of the new company and on the documents of transfer, has rendered such a transaction very costly, and whenever possible resort is now had to a reorganisation of the existing company (see page 441, *et seq.*), but there are cases where only a total reconstruction will meet the requirements of the case.

A liquidation for the purpose of reconstruction has the same effect as any other winding up: *e.g.* debentures and other debts payable at a future date become immediately payable, and leases forfeitable in the event of a winding up are determined.¹ In cases where the debentures are repayable with a premium in case of a reconstruction, the premium is payable even though a single company does not take over the whole business of the liquidating company.²

The sale of the undertaking may be effected (1) before the liquidation, under powers contained in the Memorandum, but this is only possible when a liquidation is not in immediate contemplation, or (2) after the liquidation is commenced, under the powers contained in Section 192 (formerly Section 161 of 1862).

For some years it was considered that if the Memorandum of Association contained powers for the company to sell its business

¹ *Horsey Estate, Limited v. Steiger*, [1899] 2 Q. B. 79, *Fryer v. Ewart*, [1902] App. Ca. 187. Where such leaseholds are mortgaged the mortgagees are allowed a reasonable time to remove the tenants' fixtures comprised in their security (*Glasir Copper Mines*, [1904] 1 Ch. 819).

² *South African Supply and Cold Storage Co.*, [1904] 2 Ch. 268, where Buckley, J., discussed what constitutes a reconstruction.

to another company in consideration of shares,¹ and to distribute the shares² in specie, this would enable the company to avoid compliance with the provisions of Section 192 referred to below³; but the contract for sale had to be made before the company was in liquidation. In 1908, however, the question came before the Court of Appeal, which held⁴ that the proper function of the Memorandum of Association was to deal with the objects of the company during its corporate life, and not after that life had come to an end, nor "to define under the corporate objects the distribution of the assets after the corporate life is at an end"⁵; and further, considering that the object of the scheme of selling for partly paid shares was to compel members to accept a further liability or lose all interest in the concern, declared that "any clauses which can be used to maintain a scheme which imposes upon the member the alternative of accepting liability for a larger sum or being dispossessed of his status as shareholder upon terms which he is not bound to accept are *ultra vires*." Accordingly, in cases where Section 192 is not called into operation the right of every member is "to have the assets, including the shares in the purchasing company, realised and applied, first in payment of the debts, and then to have his proportionate share of the balance."⁶ Therefore, although a company can sell its undertaking under powers in the Memorandum when it is intended to retain the proceeds of sale in the business of the company (e.g. when a single steamship company sells its only ship and with the purchase price buys another), yet "if the company is proposed to be wound up and the transaction is a sale and distribution, then . . . the Statute provides that sale by conversion into money may be replaced by exchange for shares upon the terms, but only upon the terms, of complying with the provisions of Section 161" (now Section 192),⁷ in which case the right of a member to dissent cannot be excluded. Before this decision it had been held that the sale, when made under the Memorandum, must be one which contemplates the payment of the consideration to the vendor company. Any scheme which involves the issue of the new shares direct to

¹ An ordinary power to sell is construed as being a power to sell for cash (*Payne v. Cork Co.*, [1900] 1 Ch. 308), and would not justify a sale for shares, but a power to sell "in such manner and on such terms as the company shall think proper" authorises a sale for shares (*William Thomas & Co., Limited*, [1915] 1 Ch. 325).

² Either fully paid or partly paid (*Mason v. Motor Traction Co.*, [1905] 1 Ch. 419).

³ *Cotton v. Imperial and Foreign Agency Corporation*, [1892] 3 Ch. 454; *Wall v. London and Northern Assets Corporation*, [1898] 2 Ch. 400; *Booth v. New Afrikaner Gold Mining Co.*, [1903] 1 Ch. 295; *New Zealand Gold Extraction Co. v. Peacock*, [1894] 1 Q. B. 622.

⁴ *Disgood v. Henderson's Transvaal Estates*, [1908] 1 Ch. 743.

⁵ *Ibid.* 1 Ch. 757.

⁶ *Ibid.* 1 Ch. 761.

⁷ *Ibid.* 1 Ch. 762 *Etheridge v. Central Uruguay Co.*, [1913] 1 Ch. 425.

the members and declares that those who do not take up their proportion shall lose their interest in the assets is *ultra vires*¹; for the old company could not take powers to distribute its assets among its members except in a liquidation, and if a liquidation necessarily intervenes Section 192 applies.

The procedure under Section 192 is as follows:—The company must go into liquidation,² and pass special resolutions authorising the liquidator to sell the undertaking under Section 192 (for the sale under this section can only be made by the liquidator). The authority may be general, or may be confined to a specified sale, to be made in accordance with a scheme of reconstruction or a draft agreement submitted to the meeting. To avoid unpleasant mistakes, it is advisable that the resolutions authorising the sale of the property should be submitted simultaneously with the winding-up resolutions, so that if the former are not carried the latter may also be dropped: otherwise the company will find itself in liquidation without any scheme for selling its business.³ Both the voluntary winding up and the authority for a sale require special resolutions; but they may be passed together at the first meeting, and then confirmed together at the second meeting. Special notice of each resolution must, however, be given to the shareholders, specifying that a sale is intended under Section 192.⁴ and if the directors derive any special advantage a notice which does not disclose this fact is insufficient.⁵ But it is no objection to a scheme of reconstruction that it openly gives a bonus to directors.⁶

Where a draft agreement for sale is prepared the special resolution may refer to and approve it, and no other scheme of reconstruction is necessary. But power should be taken for the agreement to be carried out with or without modifications.

If any member of the company⁷ being wound up who has not voted for the special resolution at either of the meetings expresses his dissent from the resolution in writing, addressed to the

¹ *Manners v. St. David's Gold Mines*, [1904] 2 Ch. 503.

² The resolution sanctioning the sale may be either before, contemporaneously with, or after the resolution for voluntary winding up (Section 192).

³ *Cleve v. Financial Corporation*, [1871] 16 Eq. 363; *Clinch v. Financial Corporation*, [1889] 4 Ch. 117; *Thomson v. Henderson's Transvaal Estates*, [1908] 1 Ch. 765.

⁴ *Imperial Bank of China v. Bank of Hindustan*, [1908] 6 Eq. 91; *ex parte Fox*, [1871] 1 Ch. 193.

⁵ *Kaye v. Croydon Tramways*, [1908] 1 Ch. 358; *Tiessen v. Henderson*, [1899] 1 Ch. 661; *Clarkson v. Davies*, [1923] A. C. 100.

⁶ *Southall v. British Mutual Life Association*, [1871] 6 Ch. 614.

⁷ This includes the executors of a deceased member, even if the Articles declare that they shall not have the rights of a member till they are registered (*Llewellyn v. Kasintoe Rubber Estates*, [1914] 2 Ch. 679).

liquidator and left at the office of the company¹ not later than seven days after the date of holding the confirmatory meeting, he may require the liquidator either not to carry out the scheme, or to purchase his interest² at a price which, if not settled by agreement, shall be determined by arbitration (Section 192, Sub-sections 3 and 6). In such an arbitration the dissentient has to prove the value of his interest, but he will not be allowed to examine the directors under Section 174 to obtain evidence for this purpose.³ If a person who ought to be but is not on the Register of Members gives notice of dissent the Court may, on making an order for rectifying the Register, declare that it shall relate back, so as to render the notice of dissent effective.⁴

The decisions as to what may be lawfully inserted in a scheme of reconstruction are summarised by Buckley, L. J., as follows:—“(1) That the shares for distribution be partly paid shares, or (2) that if ‘a member’ wants the shares he must apply for them within a limited time, or (3) that shares unapplied for are to be at the disposal of the new company, or (4) that shares unapplied for may be sold and the member who does not assent shall take the proceeds,⁵ . . . or (5) that the shares shall not go to the company or be assets of the company, but shall go direct to the members,” but “if there are dissentient members unpaid the company may be put under an undertaking not to part with the assets until provision is made for them.”⁶

Finding the money to pay out dissentient shareholders in a reconstruction is often a great difficulty where the shares of the new company are not marketable. There is, however, no way of avoiding the obligation to pay out these dissentient members.⁷ The Articles used often to provide that shareholders dissenting shall not have the rights given them by this section, or that the value of their interests shall be determined in some other way than by arbitration under the Act; but such provisions are invalid, for the Articles cannot negative a provision in the Statute for the

¹ In the case of a Rhodesian company, under similar words in the Colonial Ordinance, Warrington, J., held that a notice actually served on the liquidator in England and not left at the registered office was sufficient, and that the liquidator could waive service at the office (*Brailley v. Rhodesia Consolidated, Limited*, [1910] 2 Ch. 95).

² The notice must in terms state both alternatives for the liquidator to choose from, or it will be inoperative (*Domecrara Rubber Co.*, [1913] 1 Ch. 331; *Union Bank of Kingston-upon-Hull*, [1890] 13 Ch. D. 808).

³ *British Building Stone Co.*, [1908] 2 Ch. 450.

⁴ *Sussex Brick Co.*, [1904] 1 Ch. 503.

⁵ That is, if he is not a “dissentient.” If he dissents his rights must be ascertained by agreement or arbitration, and he cannot be compelled to accept the selling value of his shares.

⁶ *Biggood v. Henderson's Transvaal Estates*, [1908] 1 Ch. at 700.

⁷ *Ex parte Fox*, [1871] 6 Ch. 187, 192; and see next note.

benefit of the whole body,¹ and they are not an agreement settling the price within the meaning of Section 192, Sub-section 3.² If the company being wound up is in difficulties, the value of the interest of such members is of course very small.

Usually, when further money is required, the arrangement is that holders of fully paid shares in the old company shall accept shares which are not fully paid in the new. This will of course make the probability of there being dissentient shareholders much greater; but if they have not given notice of dissent within seven days, they cannot claim to be bought out. A shareholder who has not dissented cannot, however, be compelled to take shares having a liability, and if he refuse the new shares he loses all interest in the company, and is not liable for any calls on the new shares.³ In a case where there is a liability on the new shares a time should be fixed within which shareholders must elect whether they will take the new shares, and any not taken up will then be at the disposal of the old company or its liquidator⁴; or the scheme may provide that the shares not taken up shall be at the disposal of the new company,⁵ or that the consideration shall be reduced by the amount of the shares unapplied for after the expiration of the period named; but the new company and the liquidator have no power to issue the partly paid shares to members of the old company who have failed to apply in time.⁶ Reasonable time must be given for members to elect whether they will take the new shares, and it must extend to a date beyond the registration of the new company.⁷ The shares when not fully paid will be allotted direct to the shareholders, and not to the liquidator.⁸ The liquidator usually sends a notice to the members of the old company, enclosing a form of application to be sent to the new company. This application, if sent in, is only an offer to take the shares, and may be withdrawn before it is accepted by the new company. It is not an acceptance of the offer by the new company so as to make the applicant a member forthwith.⁹

¹ *Payne v. Cork Co.*, [1900] 1 Ch. 308; *Bisgood v. Henderson's Transvaal Estates*, [1908] 1 Ch. at page 758.

² *Baring-Gould v. Sharpington Pick Syndicate*, [1899] 2 Ch. 80.

³ *Higgs's Case*, [1805] 2 H. & M. 657.

⁴ *Postlethwaite v. Port Philip &c. Co.*, [1890] 43 Ch. D. 452.

⁵ *Burdett-Contts v. Hannan's True Blue Gold Mine*, [1899] 2 Ch. 616. It is doubtful in such a case whether the new company can treat the shares as partly paid up.

⁶ *Macphail v. Poorman Gold Mines*, *Times*, 13th March, 1897.

⁷ *Re South Australian Petroleum Fields*, [1894] W. N. 189.

⁸ *Re City and County Investment Co.*, [1890] 13 Ch. D. 475; *Transvaal Exploring Co. v. Albion Gold Mines*, [1899] 2 Ch. 370.

⁹ *Metropolitan Fire Insurance Co.*, *Wallace's Case*, [1900] 2 Ch. 671.

Where the new company considers that it is an advantage to have as many as possible of the partly paid shares issued, the liquidator should be empowered to sell shares not applied for, and, as far as possible, should sell them. The proceeds of such a sale will belong to the members of the old company who have neither accepted shares in the new company nor dissented, for the other members have already received their proportion of the purchase consideration.¹ The liquidator will nominate the purchasers of the shares to receive an allotment of the number they have bought credited as partly paid.

Recently it has been a custom to underwrite the shares offered to the members of the old company, but it is difficult to see how either the old company or the new is justified in applying its assets in paying people to take shares already partly paid. Cozens-Hardy, J., stated such underwriting to be illegal and improper, and the Court of Appeal required it to be withdrawn from a scheme to which its sanction was asked under The Joint Stock Companies Arrangement Act, 1870.² However, in another case where the scheme of reconstruction provided that any shares which were not taken up by members of the old company should be issued to a nominee of the new company, who was, in fact, an underwriter, the Court of Appeal held that there was no objection to the scheme,³ and Nevill, J., has held that the new company may pay a commission to underwriters for agreeing to purchase the partly paid shares from the liquidator of the old company at a nominal sum, so as to become liable to pay up the balance of the shares.⁴

It must be observed that Section 192 only authorises a sale to a company already in existence or formed for the purpose of purchasing the assets of the old company. Hence a sale to an individual cannot be carried out under this section,⁵ but an agreement may be made with an individual acting as agent or trustee for a company about to be formed, and not purchasing to make a profit for himself.⁶ Under the Act of 1862 it was held that the sale might be to any company, British or foreign, and whether incorporated under the Companies Act or not.⁷ But under the Act of 1908 it has been held that the sale can only be to a company incorporated under the Companies Acts,⁸ for by the

¹ *Lake View Extended Gold Mine*, [1900] W. N. 44.

² *Canning Jarruh Timber Co.*, [1900] 1 Ch. 708, 69 L. J. Ch. 416.

³ *Burdett-Countts v. Hauman's True Blue Gold Mine*, [1899] 2 Ch. 616.

⁴ *Barrow v. Parings Mines, Limited*, [1900] 2 Ch. 658.

⁵ *Bird v. Bird's Patent Sewage Co.*, [1874] 9 Ch. 358.

⁶ *Re Hester & Co.*, [1881] 41 L. T. N. S. 757.

⁷ *Ex parte Fox*, [1871] 6 Ch. 183.

⁸ *Thomas v. United Butter Companies of France*, [1909] 2 Ch. 484.

definition clause. (Section 285) "company" means a company formed and registered under one of the Companies Acts.

If a sale to an individual is intended, it must be made either under the general power of the liquidator to dispose of the assets of the company—in which case he must sell for cash and will be responsible for obtaining a proper price; or the sale may be sanctioned under Section 120 as part of a compromise or arrangement.

If after a voluntary winding up of a company has been commenced an order is made for winding it up by or under the supervision of the Court, the scheme becomes void unless sanctioned by the Court (Section 192, Sub-section 5). This sanction cannot be given in the voluntary winding up. It will only be effective if given when the company is in compulsory liquidation or being liquidated under supervision.¹ When a scheme is unfair or improper this may be a ground for the Court making a compulsory order on the application of dissatisfied shareholders,² but, "generally speaking, the only persons who could raise this question or ask for an order . . . would be the creditors."³

The arrangement for a sale under Section 192 can provide for the manner in which the consideration is to be paid, but cannot determine how it is to be distributed among the members of the vendor company, as this must be done in strict accordance with their rights.³ It will be seen that this introduces a serious difficulty where there are either preference or founders' shares having special rights in the distribution of surplus assets. If 100,000 shares of £1 each are to be distributed, and the rights of the holders of preference shares to the extent of £20,000 are that they shall be paid in full the amount of such shares before any repayment is made to the holders of ordinary shares, who shall say how many shares in the new company would be equivalent to a payment in full of the amount of the preference shares?

It is often attempted to meet the difficulty by giving holders of preference shares in the old company preference shares in the new; but this will not prevail over the rights of any old preference shareholders who insist on getting the full value of their shares before the old ordinary shareholders get anything.

The result is that in companies where there are preference shares a reconstruction is not possible unless either there is power in the Articles of Association to meet the circumstances of the

¹ *Callao Bis Company*, [1889] 42 Ch. D. 109.

² *Consolidated South Rand Mines*, [1909] 1 Ch. 491.

³ *Griffith v. Paget*, [1877] 5 Ch. D. 894 and 6 Ch. D. 514; *Simpson v. Palace Theatre*, [1903] W. N. 91 affirmed by Court of Appeal, [1893] 9 Times L. R. 470.

case, or the preference shareholders consent unanimously,¹ or those who do not consent to the proposed distribution also dissent from the whole scheme, so as to be paid out under Section 192. Such a scheme has, however, been brought before the Court of Appeal in accordance with Section 120, and sanctioned, so as to be binding on the preference shareholders²; but the Court of Appeal in a later case declared that it has no jurisdiction³ under this section to compel shareholders to accept shares in another company.³ These two cases are very difficult to reconcile, as in the earlier case (which was not cited in the later one) the Court expressly held that it had jurisdiction, and Astbury, J., has decided that the General Motor Company's Case No. 2³ must have depended on the special circumstances,⁴ and sanctioned a scheme for sale for shares, which allowed dissent by dissatisfied members. The Court of Appeal has also sanctioned a scheme by which each shareholder was compelled to hand over a part of his holding for the purchase of the undertaking of another company, and Warrington, L. J., explained the General Motor Company's case by saying, "In that case there was an attempt by means of what was called an arrangement between the company and its shareholders to do that which the Act only permitted to be done in another way."⁵ This does not explain the Tea Corporation's case.

The whole subject was exhaustively discussed by Astbury, J., in a recent case,⁶ with the result that the following propositions were laid down:—

- "1. When a so-called scheme is really and truly a sale &c. under Section 192, *simpliciter*, that section must be complied with and cannot be evaded by calling it a scheme of arrangement under Section 120.
2. Where a scheme of arrangement cannot be carried through under Section 192,⁷ though it involves (*inter alia*) a sale to a company within that section for shares, policies, and

¹ Note that the Court does not draw the inference that shareholders not represented at the meeting have consented (North-West Argentine Railway, [1900] 2 Ch. 892).

² *Sorsbie v. Tea Corporation*, [1904] 1 Ch. 12.

³ *Re General Motor Car Co. No. 2*, [1913] 1 Ch. 377.

⁴ *Sandwell Park Colliery Co.*, [1914] 1 Ch. 580.

⁵ *Re Guardian Assurance Co.*, [1917] 1 Ch. 331. This is the more notable as it overruled a careful judgment of Younger, J., who relied on the dictum of Buckley, L. J., that the arrangement must be in the nature of a compromise.

⁶ *Anglo-Continental Supply Company, re*, [1922] 2 Ch. 723.

⁷ As, for instance, where the sale is to a foreign company, which cannot be carried out under Section 192: *Thomas v. United Butter Companies of France*, [1909] 2 Ch. 494; or where there is more than one class of shares in the transferor company, and an arrangement is required to regulate the distribution of the shares to be received from the transferee company, as in the *Sandwell Park Colliery Co.* (*supra*). See also *Needhams, Limited*, [1923] W. N. 289.

other like interests,' and for liquidation and distribution of the proceeds, the Court can sanction it under Section 120 if it is fair and reasonable in accordance with the principles upon which the Court acts in these cases, and it may, but only if it thinks fit, insist as a term of its sanction on the dissentient shareholders being protected in manner similar to that provided for in Section 192.

3. Where a scheme of arrangement is one outside Section 192 entirely, the Court can also and *a fortiori* act as in proposition 2."

Schemes of reconstruction under Section 192 are often upset by a dissentient minority on the ground that some of the provisions are an infringement of the rights of the minority, which the majority cannot impose upon them. If proceedings are taken to set aside a sale to another company after the agreement for sale has been executed the purchasing company must be made a defendant to the action,¹ and if the method of distributing the purchase consideration can be severed from the provisions for sale the sale may stand good, leaving the proper distribution of the shares to be made according to the rights of the members of the vendor company.² The resolution for winding up is not invalidated by reason of its being coupled with an invalid resolution dealing with the distribution of the purchase consideration.³

The liquidator must apply the funds which he receives from the new company in paying the costs of the liquidation and any debts which the old company is bound to pay, and in buying out dissentient members. If anything remains, it must be distributed among the members of the old company according to their rights. If the cash which the liquidator receives is not sufficient for the above purposes, he must raise cash by selling or mortgaging the shares or other property which he receives from the new company. The shares remaining over he will distribute among the members of the old company who have not been bought out.

The contract for sale usually provides that the purchasing company shall take over all the assets and pay all the liabilities of the old company, so that the business of the old company can be wound up at once; but such an arrangement does not relieve the liquidator of the old company from the obligation of seeing that the debts are duly paid before the old company is dissolved: to leave everything to the new company is "a gross dereliction

¹ Doughty v. Lomagunda Reefs, Limited, [1903] 1 Ch. 673.

² Wall v. London and Northern Assets Corporation, [1898] 2 Ch. 409.

³ Thomson v. Henderson's Transvaal Estates, [1908] 1 Ch. 765; *ex parte* Fox, [1871] 6 Ch. 187; Cleve v. Financial Corporation, [1874] 16 Eq. 303.

of duty by the liquidator,"¹ and if he fail to pay income tax due by the company he will be personally liable to the Crown for the amount.²

The agreement for sale usually contains an agreement for the transfer of all book debts, things in action, and claims of the company. This should be perfected by an actual assignment before the old company is dissolved; otherwise the company may be hampered in recovering the amounts.

When executors or trustees hold shares in the old company and have no power to invest in the shares of such a company as the purchasing company, they are compelled to dissent or to agree to a sale of their rights. But if it can be shown that the case is one of emergency not contemplated by the settlor, and a large loss is likely to result from such a course, the Court can, upon application made by the trustees, sanction their taking up the new shares if they are fully paid.³ It is, however, hardly possible that the Court's assent could be obtained to such a speculative transaction as taking partly paid shares.

Where a will contains a specific bequest of shares, and between the date of the will and the death of testator the company is reconstructed without substantial alteration in its constitution, the shares in the new company will pass under the bequest.⁴

If a third party has insured or guaranteed the payment of any debts of a company, a reconstruction sanctioned by the Court, and therefore binding on the creditors, does not relieve the guarantor or insurer from his liability to make good the amount payable, but he is entitled to have handed over to him whatever benefit the creditors would have had from the reconstruction.⁵ Nor if the company guaranteeing has re-insured the debts does an arrangement made in the liquidation of the guaranteeing company release the re-insurer.⁶

If a liquidator makes a mistake in distributing the purchase shares, and has none left to correct his mistake, the Court cannot upon a summons give damages against him.⁷ Whether in an action damages could be recovered is doubtful.

As regards the new company, the same considerations will apply as in the case of a purchase from ordinary vendors, and the remarks on pages 115 and 197, *supra*, should be consulted

¹ *Pulsford v. Devenish*, [1903] 2 Ch. 625; *Argyll's, Limited, v. Coxeter*, [1913], 20 T. L. R.

² *Re New Zealand Joint Stock Corporation*, [1907] 23 Times L. R. 238.

³ *Re New's Settlement*, [1901] 2 Ch. 534.

⁴ *Re Leeming, Turner v. Leeming*, [1912] 1 Ch. 828.

⁵ *London Chartered Bank of Australia*, [1893] 3 Ch. 540; *Dano v. Mortgage Insurance Co.*, [1891] 1 Q. B. 54.

⁶ *Law Guarantee Society v. Munich Re-insurance Co.*, [1912] 1 Ch. 138.

⁷ *Hills's Waterfall Co.*, [1896] 1 Ch. 947.

with reference to filing the contracts with the Registrar of Companies and the payment of stamp duty.

A reconstruction can also be carried out as an arrangement under Section 120, which applies not only as between the company and the creditors or any class thereof, but as between the company and the members or any class thereof. This section declares that where any compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the Court may, on the application of the company, or any creditor or member of the company, or the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called; and if a majority in number representing three fourths in value of the creditors or class of creditors, or members or class of members, present either in person or by proxy, agree to the compromise or arrangement, and it is also sanctioned by the Court, it will be binding on all the creditors or class of creditors, or on the members or class of members, as the case may be, and on the liquidator and the contributories of the company. A scheme which merely provided for shareholders of different classes taking shares of reduced amount in a new company was held not to be within the section, *Buckley, L. J.*, saying that an arrangement under the section must be something analogous to a compromise¹; but, as stated on page 627, this is inconsistent with the *Guardian Assurance Company's case*² and such a scheme has been sanctioned by the Court of Appeal.³ It is no objection that such a scheme varies the rights of the respective classes of shareholders even when those rights are stated in the Memorandum of Association.⁴

The practice is to apply by originating summons for an order convening the requisite meetings, and if the appropriate majorities are obtained to apply by petition to the Court for its sanction to the scheme.

In sanctioning a scheme the Court may ignore the fact that a class has not consented if it be proved that upon an immediate distribution of the assets none would be available for that class.⁵

The Court may make it a term of giving its consent that members shall be given the same opportunity of dissenting as they would have had under Section 161 of the Act of 1862, or Section 192 of the Act of 1908.⁵

¹ *Re General Motor Cab Co. No. 1*, [1913] 1 Ch. 377.

² [1917] 1 Ch. 431.

³ *Sorsblue v. Tea Corporation*, [1904] 1 Ch. 12.

⁴ *Schwepes, Limited*, [1914] 1 Ch. 322; *J. A. Nordberg, Limited*, [1915] 2 Ch. 430.

⁵ *Canning Jarrah Timber Co.*, [1900] 1 Ch. 708.

COMPROMISES WITH CREDITORS BEFORE OR DURING LIQUIDATION.

A company can now effect compromises with its creditors without going into liquidation, for Section 120 applies to companies not in the course of being wound up. The result is that with the sanction of the Court any compromise or arrangement between the company and its creditors, or any class of such creditors, may be made binding on all such creditors or class of creditors and the company, provided that it has been submitted to a meeting of the creditors or class of creditors summoned under the direction of the Court and approved by a majority in number representing three fourths in value of such creditors or class of creditors present either in person or by proxy. If the company is in liquidation the compromise or arrangement may be made binding on the liquidator and contributories, and any compromise or arrangement between the company and its members, or any class of its members, may equally be made binding. The cases cited below were decided in reference to a company in liquidation making an arrangement with its creditors; but the general principles will be the same in the case of a going company. The procedure is discussed below.

In the case of the reconstruction of a company, if the creditors of the old company are to be paid in full at once, their consent need not be asked to a reconstruction, but if they are to accept a composition, or to take shares or debentures in the new company in satisfaction of their claims, or to accept deferred payment, their consent must be obtained to a scheme of composition.

Such a composition with creditors may in a voluntary winding up be effected either in accordance with Section 191 or under Section 120.

If the compromise with creditors is proposed in accordance with Section 191, an extraordinary resolution of the company, and the assent of three fourths in number and value of the creditors, are necessary to sanction the arrangement, which will then bind all the creditors. The assent of the creditors need not be given at a meeting, and may be evidenced by their signatures to a document containing the terms of the compromise. There is, however, a right of appeal to the Court within three weeks of the completion of the arrangement (Sub-section 2).

If there be a large number of small creditors (officers, servants, workmen, and tradesmen, for instance), it is often advantageous to pay them off down to the date of the liquidation, and deal only with the larger creditors, whose signatures can more readily be obtained to a proper scheme.

If the assent of three fourths in number and value cannot be obtained without great difficulty, it is desirable to proceed under Section 120. Under that section it is necessary for the liquidator or a creditor to apply in a summary way¹ to the Court to call meetings of the various classes of creditors and members with whom the compromise is to be made. If at the meetings a majority in number representing three fourths in value of those who are present, either in person or by proxy, agree to the arrangement, and it is subsequently sanctioned by an order of the Court (which should be obtained on petition), such arrangement becomes binding on all persons concerned. If part of the arrangement involves a new company taking over the liabilities of the old company, the creditors of the old company, although not actually parties to the agreement for sale, can enforce their rights against the new company.²

If in a company different amounts are paid on shares, or a set of shareholders have paid amounts in advance of calls, this makes various classes of shareholders, and separate meetings must be called.³

For such an arrangement a resolution of the company is not absolutely necessary; but it is obvious that, unless there is no chance of the contributories receiving anything, it is very desirable that the shareholders should give their consent, as the absence of such sanction might well form a ground for the Court refusing to confirm the arrangement. The company in general meeting should therefore adopt the compromise, either directly or by reference to the scheme of reconstruction.

At meetings held in pursuance of this Act proxies are allowed, and foreign creditors must be taken into account.⁴ If the company is in compulsory liquidation the Rules of 1909 will apply. In other cases the Court gives directions, and may allow the result of proxies to be communicated by cablegram from distant places.⁵ The proper form of proxy will be found in "Practice Direction" [1896] W. N. 56, adopted by "Practice Direction" [1910] W. N. 154. Meetings of shareholders not convened exactly in

¹ Sometimes this is done by an originating summons, and a petition for confirmation is subsequently filed. In other cases the petition is first filed and an ordinary summons taken out. There seems no reason why the whole proceeding should not be by originating summons asking for the calling of meetings and the sanction of the Court to the scheme, but such a course is not favoured in practice. These proceedings may be taken before the Judges taking company cases or any other Judge of the Chancery Division. Where a company not in liquidation is proceeding under this section, the application must be made to the Court having jurisdiction to wind up the company, as to which see page 464 *supra*.

² *Craig's Claim*, [1895] 1 Ch. 267.

³ *United Provident Assurance Co.*, [1910] W. N. 199.

⁴ *Queensland National Bank*, [1893] W. N. 128.

⁵ *English, Scottish, and Australian Bank*, [1893] 3 Ch. 365.

accordance with the directions of the Court may be held good, if in the result, a sufficient number of the shares are accounted for.¹ But it is most advisable to comply strictly with the directions. .

If there are debentures to bearer, the holders must produce them at the meeting, or otherwise prove their title to be treated as debenture holders before the vote is taken.²

Under the powers given by Section 120, if the requisite majority of debenture holders agree to forego their security, and accept preference shares in the new company in exchange for their debentures in the old company, their decision, if confirmed by the Court, will be binding upon the minority who oppose the exchange³; and an agreement whereby a new company agrees to purchase all the assets and pay a composition to the creditors will be enforced, even though a larger sum may be subsequently offered by another person.⁴

The sanction of the Court to the scheme is essential,⁵ and in considering the arrangement the Court looks into the whole scheme, and will take into consideration whether the votes were given *bonâ fide* in the interests of the creditors.⁶ It also requires the costs and remuneration payable under the scheme of reconstruction to be subject to taxation.⁷ If the arrangement is being carried out without a liquidation, the Court has no jurisdiction to restrain a judgment creditor from levying execution pending the holding of the meeting.⁸

The Court will not sanction a scheme which includes the payment of a commission to persons underwriting the issue of partly paid shares, the reason given by Cozens-Hardy, J., being that such an underwriting was illegal, and by the Court of Appeal that to do so would make the Court promoters.⁹

The Court refused to entertain a scheme which provided that shares already fully paid should be treated as subject to a new liability of three shillings per share, holding that any such arrangement must be carried out under Section 192,¹⁰ but later

¹ Anglo-Spanish Tartar Refineries, *re*, [1924] W. N. 222.

² Wedgwood Coal Co., [1877] 6 Ch. D. 627.

³ *Re Empire Mining Co.*, [1890] 44 Ch. D. 402; *re Alabama, New Orleans &c. Railway Co.*, [1891] 1 Ch. 213. *Folitt v. Eddystone Granite Quarries*, [1892] 3 Ch. 75.

⁴ *Re Oriental Bank*, [1887] W. N. 109, 112.

⁵ In the reconstruction of Olympia, Limited, in 1897, the Court required the claims against directors to be excepted from the sale to the new company, and in the result the Official Receiver recovered upwards of £20,000, which was held to be distributable among all the members, whether they took up their shares in the new company or not.

⁶ *Re Alabama, New Orleans &c. Railway Co.*, [1891] 1 Ch. 213.

⁷ *Re Mortgage Insurance Corporation*, [1896] W. N. 4.

⁸ *Booth v. Walkden Spinning Co.*, [1900] 2 K. B. 368.

⁹ *Canning Jarral Timber Co.*, [1900] 1 Ch. 708, 60 L. J. Ch. 416.

¹⁰ *San Francisco Brewery Co., Limited*, [1909] 5th April, in the Court of Appeal. The House of Lords refused to interfere with the discretion of the Court of Appeal.

it sanctioned a scheme which required each shareholder to hand over a portion of his fully paid shares to form the consideration for the purchase of another undertaking.¹

An arrangement under Section 120 does not bind foreign or colonial creditors, who may, notwithstanding such an arrangement, resort to their own Courts to enforce their claims against the company.²

When the company is in liquidation it is often a term of the scheme that all proceedings in the winding up shall be stayed and that the company shall resume business. In a proper case the Court will make the necessary order under Section 144.

DISSOLUTION OF THE OLD COMPANY AFTER RECONSTRUCTION.

Upon a reconstruction being carried into effect the liquidator should wind up the old company with all possible speed, and, after making up his accounts, should call and advertise the general meeting for receiving those accounts as provided in Section 195. He should then, at once, make a Return to the Registrar of the meeting having been held, and at the end of three months from the registration of the Return the company is dissolved (Section 195), subject, however, to the power of the Court to re-open the dissolution (see page 538, *supra*). The importance of this is that sometimes claims arise for damages, or on other grounds, which, if the company were still in existence, might give rise to great difficulties. The liquidator will have to pay all the debts of which he knows³; but claims for damage may arise unexpectedly, and if the shares of the new company have been distributed there is nothing to meet such claims. A contract between the old and the new companies that the new will satisfy the liabilities of the old company cannot be enforced against the new company by creditors of the old for their own benefit, unless it has been made part of a scheme sanctioned under Section 120.⁴

¹ Guardian Assurance Company, [1917] 1 Ch. 431.

² New Zealand Loan and Mercantile Agency Co., [1898] App. Ca. 349, decided under The Joint Stock Companies Arrangement Act, 1879.

The liquidator will be personally liable, however, if he does not secure the payment of claims of which he has notice (*Pulsford v. Devenish*, [1903] 2 Ch. 626; *New Zealand Joint Stock Corporation*, [1907] 23 Times L. R. 238).

Craig's Claim, [1895] 1 Ch. 267.

APPENDIX A.

THE LONDON STOCK EXCHANGE QUOTATION.

COMPANIES of any magnitude or importance usually desire an official quotation on the London Stock Exchange, which greatly facilitates transactions in shares, and accordingly enhances their value. The Committee of the Stock Exchange refuse a quotation, however, unless the formation of the company has been carried out in accordance with certain Rules which have been laid down. A quotation is, therefore, a guarantee that these formal matters are in order, but is of course no guarantee of the solidity or stability of the company. Official quotations on some of the great provincial Stock Exchanges, *e.g.* Manchester, Liverpool, Glasgow, are frequently sought also in the case of very large or local companies; the regulations of these exchanges are framed on those of the London Stock Exchange.

Dealings on the Stock Exchange have sometimes been resorted to for improper purposes; but it is illegal and fraudulent to "rig the market" or enhance prices by fictitious dealings.¹ Contracts made with this object cannot be enforced in the Courts,² and the creation of a market by circulating false rumours or making illusory bargains is a criminal offence.³ When brought to light the Committee of the London Stock Exchange punish guilty members by expulsion.

Before the securities of any company may be dealt in on the Stock Exchange, "leave to deal" must be obtained. This is quite distinct from application for an official quotation, although it is a prior condition of obtaining the latter.

The present requirements in connection with leave or permission to deal and official quotations are as follow:—

LEAVE TO DEAL.

A. DOCUMENTS REQUIRED FROM COMPANY.

1. Certificate of incorporation (in the case of a company registered abroad notarially certified copy or translation of certificate of incorporation and of bye-laws).

2. Copy of resolutions authorising issue.

¹ *Marzetti's Case*, [1880] 28 W. R. 541; *Twycross v. Grant*, [1877] 2 C. P. D. 400.

² *Scott v. Brown*, [1892] 2 Q. B. 724.

³ *Rex v. De Berenger*, [1814] 3 M. & S. 67; *Reg. v. Aspinall*, [1877] 2 Q. B. D. 48; *Scott v. Brown*, [1892] 2 Q. B. 724.

3. Certified copy of agreement relating to issue of shares credited as fully paid and of any other contracts mentioned in prospectus.

4. In the case of an issue for cash, copy of prospectus, offer for sale or circular of issue, stating all material conditions relating to the flotation of the issue, and (in the case of a new company) to the formation of the company and endorsed with the date of advertisement if publicly advertised.

5. If issued *pro rata* to existing shareholders, undertaking to split letters of renunciation.

6. Specimen (or advance proof) of allotment letter, and, if possible, of definitive certificates. In order to facilitate the certification of transfers it is suggested that the allotment letters should contain the distinctive numbers of the shares to which they relate.

7. Letter (a) giving distinctive numbers of Shares issued (b) undertaking to issue all the allotment letters simultaneously and to certify transfers against allotment letters, and (c) stating (in the case of a further issue) whether or not the shares are identical in all respects with existing shares.

8. Approximate date when definitive certificates will be ready for issue.

9. In all issues other than Government or municipal loans, whether by prospectus or otherwise, particulars of any underwriting must be disclosed, and copy of underwriting agreement and of sub-underwriting letter (if any) must be produced.

10. In case of a debenture issue, copy or draft of trust deed.

11. List of allottees or present holders—name, address, and holding (when required).

B.—In the absence of any prospectus publicly advertised in this country, or circular to shareholders, the committee will also require an advertisement in two leading London morning papers giving all material conditions relating to the formation of the company and to the flotation of the issue, and stating that the directors collectively and individually are responsible for the information advertised.

These details must also include official statements as to—

- (1) The capital, authorised, and issued.
- (2) Borrowing powers and the extent to which they have been exercised.
- (3) Date and particulars of incorporation.
- (4) Names and addresses of directors, bankers, auditors, and secretary.
- (5) Objects of the company, nature of its business, or particulars of property acquired.

A statement that shares are in all respects identical is understood to mean that:—

- (1) They are of the same nominal value, and that the same amount per share has been called up.
- (2) They carry the same rights as to unrestricted transfer, attendance, and voting at meetings, and in all other respects.
- (3) They are entitled to dividend at the same rate and for the same period, so that at the next ensuing distribution the dividend payable on each share will amount to *exactly the same sum*.

OFFICIAL QUOTATIONS.

(1) The Committee may order the quotation in the Official List of any security of sufficient magnitude and importance.

(2) Applications for quotation must be made to the Secretary of the Share and Loan Department, and must comply with such conditions and requirements as may be ordered from time to time by the Committee, except in cases where the Committee may determine one or more of such conditions or requirements.

(3) Three days' public notice must be given of every application.

(4) A broker, a member of the Stock Exchange, must be authorised to give the Committee full information as to the security and to furnish them with all particulars they may require.

Securities issued to vendors credited as fully or partly paid shall not be quoted until six months after the date on which permission was given for dealings in the securities of the same class subscribed for by the public, nor unless a quotation for the latter is also granted.

A. CONDITIONS PRECEDENT TO AN APPLICATION FOR OFFICIAL QUOTATION.

1. That the Prospectus—

Shall have been publicly advertised;

Agrees substantially with the Act of Parliament or Articles of Association;

Provides for the payment of ten per cent. upon the amount subscribed;

If offering debentures or debenture stock, states fully the terms of redemption;

If offering debentures states whether they are to bearer or registered;

In cases where a company has sold an issue of capital or debentures or debenture stock which is subsequently offered for public subscription either by the company or any subsequent purchaser, states the authority for the issue and all material conditions of sale.

2. That two thirds of the amount proposed to be issued of any class of shares or securities, whether such issue be the whole or a part of the authorised amount, shall have been applied for by and unconditionally allotted to the public, shares or securities granted in lieu of money payments not being considered to form a part of such public allotment.

3. That the Articles of Association, and the Trust Deed where such is required, contain the provisions specified hereafter.

4. That the certificate or bond is in the form approved.

B. ARTICLES OF ASSOCIATION.

Articles of Association should contain the following provisions:—

1. That none of the funds of the company shall be employed in the purchase of or in loans upon the security of its own shares.

2. That directors must hold a share qualification.

3. That the borrowing powers of the board are limited.

4. That the non-forfeiture of dividends is secured.

5. That the common form of transfer shall be used.
6. That all share and stock certificates shall be issued under the common seal of the company and shall bear the signatures of one or more directors and the secretary.
7. That fully paid shares shall be free from all lien.
8. That the interest of a director in any contract shall be disclosed before execution, and that such director shall not vote in respect thereof.
9. That the directors shall have power at any time and from time to time to appoint any other qualified person as a director either to fill a casual vacancy or as an addition to the board, but so that the total number of directors shall not at any time exceed the maximum number fixed; but that any director so appointed shall hold office only until the next following ordinary general meeting of the company, and shall then be eligible for re-election.
10. That a printed copy of the report, accompanied by the balance sheet and statement of accounts, shall, at least seven days previous to the general meeting, be delivered or sent by post to the registered address of every member, and that three copies of each of these documents shall at the same time be forwarded to the Secretary of the Share and Loan Department, the Stock Exchange, London.
11. That the charge for a new share certificate issued to replace one that has been worn out, lost, or destroyed shall not exceed one shilling.

TRUST DEEDS.

It Deeds should contain the following provisions:-

1. Where provision is made that the security shall be repayable at a premium, either at a fixed date or at any time, upon notice having been given, the trust deed must further provide that should the company go into voluntary liquidation for the purpose of amalgamation or reconstruction the security shall not be repayable at a lower price.
2. The following clause should be inserted in all Deeds:—

“The statutory power of appointing new trustees hereof shall be vested in the company, but a trustee so appointed must in the first place be approved of by a resolution of the debenture (or debenture stock) holders passed in the manner specified in the schedule hereto. A corporation or company may be appointed a trustee of these presents.”
3. In the clause regulating the convening of meetings of the debenture (or debenture stock) holders, the following words should be inserted: “and the trustee or trustees shall do so upon a requisition in writing signed by holders of at least one tenth of the nominal amount of debentures (or debenture stock) for the time being outstanding.”
4. The clause defining an “extraordinary resolution” must provide that “the expression ‘extraordinary resolution’ means a resolution passed at a meeting of the debenture (or debenture stock) holders, duly convened and held, at which a clear majority in value of the whole of the debenture (or debenture stock) holders is present in person or by proxy, and carried by a majority consisting of not

less than three fourths of the persons voting thereat upon a show of hands, and if a poll is demanded then by a majority consisting of not less than three fourths in value of the votes given on such poll."

5. Should debentures or debenture stock be entitled "First Mortgage," provision must be made for the creation of a specific first mortgage in favour of the debenture or debenture stock holders.

D. SHARE AND STOCK CERTIFICATES.

All certificates should state on their face the authority under which the company is constituted and the amount of the authorised capital of the company.

The method of signature must be in accordance with the Articles of Association.

All certificates should bear a foot-note to the effect that no transfer of any portion of the holding can be registered without the production of the certificate.

Where the capital of a company consists of more than one class of shares of the same denomination, the distinctive numbers of the shares of each class must be printed on the face of the share certificates.

All preference share certificates should bear on their face a statement of the company's capital and the conditions, both as to capital and dividends, under which the shares are issued.

Debentures and debenture stock certificates should, in addition to legal requirements, state on their face the authority under which the company is constituted, the nominal capital of the company, the dates when the interest on the debentures or debenture stock is payable, and the authority under which the issue is made (i.e. Articles of Association and resolutions), and on their back the conditions of issue, redemption, and transfer.

E. BONDS.

Bonds must specify the amount and conditions of the loan and the powers under which it has been contracted.

Bonds and debentures of English companies must be under the common seal of the company and must bear the requisite autographic signatures.

When an issue of colonial or foreign bonds or debentures is made wholly or partly in London, those issued in London must bear the autographic counter signature of the London agents or contractors.

F. NEW COMPANIES.

Before the application form can be issued for signature there must be supplied—

A copy of the prospectus.

Two copies of the Articles of Association.

In the case of debentures or debenture stock the trust deed [where possible before execution].

G.—After the application form has been signed there must also be supplied in the case of—

SHARES.

The Certificate of Incorporation and the Certificate that the Company is Entitled to Commence Business.

Two certified copies of the prospectus, endorsed with the date when first advertised.

Two certified copies of the Memorandum and Articles of Association.

The original letters of application.

The allotment book containing a list of applicants, the number applied for by each, and the result of each application, with a summary signed by the chairman and secretary.

Should the allotment have taken place at an interval of six months or more before the date of the application, a certified list of present shareholders will also be required.

A copy of the letter of allotment, and the date when posted.

A specimen of the share certificates.

Authenticated copies of all concessions and similar documents, with notarially certified printed translations, and certified printed copies of all contracts and agreements.

An undertaking

(1) To change registered to bearer shares in one week, and *vice versa*.

(2) To certify transfers within two days.

(3) To certify transfers on Saturdays between the hours of 10.30 and 12.

A statutory declaration by the chairman and secretary, stating the following particulars:—

1. That the prospectus complies with the provisions of The Companies (Consolidation) Act, 1908.
2. That all documents required by The Companies (Consolidation) Act, 1908, have been duly filed with the Registrar of Joint Stock Companies, and the dates of filing.
3. The number of shares applied for by the public.
4. The number of shares allotted unconditionally to the public (Nos. to), and the amount per share paid thereon in cash.
5. The total number of allottees and the largest number of shares (a) applied for by and (b) allotted to any one applicant.
6. The number of shares allotted for a consideration other than cash (being Nos. to).
7. That the share certificates have been or are ready to be issued.
8. That the purchase of the property has been completed, and the purchase money paid.

H.—After the application form has been signed there must be supplied in the case of—

DEBENTURES AND DEBENTURE STOCK.

The Certificate of Incorporation, or Act of Parliament, and the Certificate that the Company is entitled to commence business.

A certified printed copy of the mortgage deed or other similar document, and the official certificate of the registration of the mortgage or charge.

Certified copies of the Articles of Association, resolutions, or other authority for the present issue.

Two certified copies of the prospectus.

The original letters of application.

The allotment book containing a list of applicants, the amount applied for by each, and the result of each application, with a summary of the whole, signed by the chairman and secretary.

Should the allotment have taken place at an interval of six months or more before the date of the application, a certified list of present stockholders will also be required.

A copy of the allotment letter, and the date when posted.

A specimen of the debentures or debenture stock certificate, and of the scrip where scrip is issued; certificates of debenture stock allotted to vendors in lieu of money payments being enfaced "Issued to Vendors."

A copy of the last published report and accounts.

A statutory declaration by the chairman and secretary, stating—

1. That the prospectus complies with the provisions of The Companies (Consolidation) Act, 1908, and that all documents required by that Act have been duly filed with the Registrar of Joint Stock Companies, and the dates of filing.
2. In the case of an English company charging property abroad, that the necessary mortgage has been properly legalized in the country where the property is situated.
3. The amount of stock applied for by the public.
4. The amount unconditionally allotted to the public (Nos. to).
5. The amount, viz. £ %, paid thereon in cash.
6. The amount allotted for a consideration other than cash (Nos. to).
7. The total number of allottees.
8. The largest amount of debentures or debenture stock (a) applied for by and (b) allotted to any one applicant.
9. That the debentures or debenture stock certificates have been or are ready to be issued.
10. That a trust deed has been executed and completed, if such be the case.
11. The effect of such trust deed, and the nature of the charge created thereby in favour of the debenture holders.

A statutory declaration by the chairman and secretary, stating—

1. The total amount of the authorised capital of the company, and how constituted.

2. The number of shares allotted unconditionally to the public (Nos. to), and the amount paid on each share in cash.
3. The number of shares taken by concessionaires, owners of property, contractors, or other parties not included in the public allotment (being Nos. to).
4. That the share certificates have been or are ready to be issued.
5. That the purchase of the property has been completed and the purchase money paid.

I.

SCRIP.

In addition to the requirements made in the case of definitive stock or bonds, a specimen of the scrip certificate must be supplied.

In cases where a Government, municipality, corporation, or company has sold an issue of stock, shares, or securities which is subsequently offered for public subscription by the purchaser, evidence must be produced that the purchasing house has received due authority to issue the scrip on account of the Government, municipality, corporation, or company, or in the alternative such scrip must be enfaced "Contractors' Scrip."

K.—After the application form has been signed there must be supplied in the case of—

FURTHER ISSUES.

A King's printers' copy of the Act of Parliament authorising, the resolutions &c. creating, and the circular or prospectus offering, the new issue.

If shares have been issued credited as fully or partly paid, certified printed copies of the contracts relating thereto.

A copy of the allotment letter.

A copy of the last report and accounts.

A specimen of the share certificate.

The allotment book, unless the allotment is *pro rata*.

An undertaking,

- (1) To change registered to bearer shares in one week, and *vice versa*.
- (2) To certify transfers within two days.
- (3) To certify transfers on Saturdays between the hours of 10.30 and 12.

A statutory declaration by the secretary, stating—

1. That the prospectus or circular complies with the provisions of The Companies (Consolidation) Act, 1908;
2. That all documents required by The Companies (Consolidation) Act, 1908, have been duly filed with the Registrar of Joint Stock Companies, and the dates of filing;
3. That the shares (Nos. to) have been applied for by and unconditionally allotted to the shareholders or the public or sold upon the market, as the case may be;
4. The amount per share paid in cash;
5. The total number of allottees, and the largest number of shares applied for by and allotted to any one applicant

6. That certificates have been or are ready to be issued.

7. That no impediment exists to the settlement of the account.

8. It must also be stated whether or not the shares are in all respects identical with those already quoted in the official list.

The statement that shares are in all respects identical means that—

They are of the same nominal value, and that the same amount per share has been called up.

They carry the same rights as to unrestricted transfer, attendance and voting at meetings, and in all other respects.

They are entitled to dividend at the same rate and for the same period, so that at the next ensuing distribution the dividend payable on each share will amount to exactly the same sum.

The statement that stock is in all respects identical means that—

All the stock is entitled to the same rights as to unrestricted transfer, and in all other respects.

All the stock is entitled to dividend at the same rate and for the same period, so that at the next ensuing distribution the dividend payable on each £100 of the stock will amount to exactly the same sum.

L.—After the application form has been signed there must be supplied in the case of—

VENDORS' SHARES.

A certified list of the present holders of the vendors' shares.

A certified copy of the last published report and accounts of the company.

A specimen of the share certificate.

A statutory declaration by the secretary, stating—

1. That the vendors' shares (Nos. to) have all been issued and certificates delivered;
2. That the shares are in all respects identical with those already quoted in the official list.

M.—After the application form has been signed there must be supplied in the case of—

OLD COMPANIES.

The Certificate of Incorporation, or Act of Parliament, and the Certificate that the Company is Entitled to Commence Business.

Authenticated copies of all concessions and similar documents, with notarially certified printed translations.

Certified copies of all prospectuses, original or otherwise, endorsed with the date when first advertised.

Two certified copies of the Memorandum and Articles of Association.

A specimen of the share certificate and of the allotment letter.

A certified copy of present register of shareholders.

Certified printed copies of contracts, agreements, &c., together with copies of all contracts relating to the issue of shares credited as fully or partly paid.

A certified copy of the company's last published report and accounts.

A short history of the company, setting forth its origin, progress, dividends, &c., the number of transfers registered during the last twelve months, and the number of shares represented by such transfers.

An undertaking,

- (1) To change registered to bearer shares in one week, and *vice versa*.
- (2) To certify transfers within two days.
- (3) To certify transfers on Saturdays between the hours of 10.30 and 12.

Statutory declaration by the chairman and secretary, stating the following particulars:—

1. That the prospectus complied with the provisions of The Companies (Consolidation) Act, 1908.
2. That all documents required by The Companies (Consolidation) Act, 1908, have been duly filed with the Registrar of Joint Stock Companies, and the dates of filing.
3. The number of shares applied for by the public.
4. The number of shares allotted unconditionally to the public (Nos. to), and the amount per share paid thereon in cash.
5. The number of shares allotted for a consideration other than cash (being Nos. to).
6. That the share certificates have been or are ready to be issued.
7. That the purchase of the properties has been completed and the purchase money paid.

N.—After the application form has been signed there must be supplied in the case of—

COLONIAL AND FOREIGN COMPANIES.

The Certificate of Incorporation, or Act of Parliament, or other similar document.

Two copies of the Statutes or Articles of Association or notarial translations of the same.

A certified list of present shareholders.

A specimen of the share certificate.

Copies of all agreements, concessions, deeds, &c., or notarially certified printed translations of the same.

A certified copy of last published report and accounts, or translation of the same.

Official evidence of quotation in the country to which they belong, or where the issue has been made.

A short history of the establishment and progress of the company from its incorporation to the present time, including particulars as to the issue of the capital.

A declaration, stating:—

1. The number of shares allotted;
2. The amount per share paid in cash;
3. That the share certificates have been or are ready to be issued.
4. That no impediment exists to the settlement of the account.

O.—After the application form has been signed there must be supplied in the case of—

RECONSTRUCTED COMPANIES.

The Certificate of Incorporation, and the Certificate that the Company is Entitled to Commence Business.

A statement of the plan of reconstruction, together with certified copies of all resolutions passed and circulars issued in connection with the reconstruction.

The allotment book, with a summary signed by the chairman and secretary.

The allotment letter, and the date when posted.

A specimen of the share certificate.

Two certified copies of the Memorandum and Articles of Association.

Certified printed copies of all contracts, agreements, &c.

Copies of all contracts relating to the issue of fully or partly paid shares.

An undertaking,

(1) To change registered to bearer shares in one week, and *vice versa*.

(2) To certify transfers within two days.

(3) To certify transfers on Saturdays between 10.30 and 12.

A statutory declaration by the chairman and secretary, stating—

1. That all documents required by The Companies (Consolidation) Act, 1908, have been duly filed with the Registrar of Joint Stock Companies, and dates of filing.

2. The authorised capital of the company.

3. The number of shares to which shareholders in the old company were entitled; the number and distinctive numbers of shares unconditionally allotted to such shareholders; and the amount per share (a) paid thereon in cash and (b) credited as paid up.

4. The number and distinctive numbers of shares applied for by and allotted unconditionally to the public, and the amount per share (a) credited as paid up and (b) paid thereon in cash

5. That the share certificates have been or are ready to be issued.

6. That no impediment exists to the settlement of the account

P.—After the application form has been signed the following documents must be supplied in the case of—

LOANS.

Details of the creation of the loan, and the authority under which it is issued, including authenticated copies of concessions, &c., with notarially certified translations.

The authority to the agents or contractors to receive subscriptions.

A certified copy of the prospectus

Evidence that all bonds issued and payable abroad bear the signature of some properly authorised person.

A specimen bond, together with a bond duly executed, or scrip certificate if issued.

Statutory declaration by the agents, stating—

1. The amount allotted unconditionally to the public.

2. The numbers and denominations of those bonds which bear the autographic signature of the London agents or contractors.

3. That the required amount, viz. £ %, has been paid thereon in cash.

4. That the scrip or bonds have been or are ready to be issued.

5. That no impediment exists to the settlement of the account.

Q.—After the application form has been signed the following documents must be supplied in the case of—

BONDS QUOTED ABROAD.

Official evidence of quotation in the country to which they belong, or where the issue has been made.

Notarially certified printed translations of all prospectuses and of the laws creating and authorising the loan.

A specimen bond, together with a bond duly executed.

An official certificate setting forth—

1. The authorised and issued amounts of the loan, and the terms of issue.
2. The distinctive numbers and denominations of the bonds.
3. Evidence that all bonds bear the autographic signature of some properly authorised person.

It is to be observed that the Committee's power is discretionary as to ordering a quotation in the Official List, and they may, therefore, refuse the quotation if a Company's Articles or Trust Deed, although containing the matters required by the Rules, contain also other provisions which are objectionable. It will be safest to adopt some form of Articles which has already had the approval of the Committee, with as few variations as possible.

Furthermore, owing to the crowded state of the Official List it may sometimes be necessary to wait awhile, even after all the formalities have been complied with, before room can be found for the new entrant.

MINIMUM SCALE OF COMMISSIONS.

By Rules laid down in 1912, and subsequently amended on various occasions, an official scale of commission is fixed, and brokers are forbidden to accept any lower scale except where the purchase price exceeds £2500, when they may make an allowance not exceeding fifty per cent. Where, however, a purchase and sale of the same security is made for the same principal during the same account, the broker is allowed to charge one commission only at the fixed scale. On a change of investments being made for the same principal during the same account, or the account immediately following, the broker may at his discretion charge a reduced commission (but not less than half the official rate) on one of the two transactions; the full rate must be charged on the side which yields the larger amount. These Rules do not apply to a case of underwriting or the placing of new issues, or to continuations of shares from account to account, provided the full *contango* rate is charged.

The Scale of Commissions is as follows:—

MINIMUM SCALE OF COMMISSIONS.

Securities of or Guaranteed by the British or Indian Government having a currency of not more than twelve years, in bargains of not less than £20,000 Stock	} ½ per cent. on Stock.
Consols, 2½% and 2¼% Annuities	¾ " " "
Other British Government Securities	"
Indian Government Stocks	"
Metropolitan Consolidated Stocks	"
London County Consolidated Stocks	"
Colonial Government Securities	"
County, Corporation, and Provincial Securities (British, Indian, or Colonial)	"
Bank of England and Bank of Ireland Stock	½ per cent. on Money.
Foreign Government and Corporation Bonds. Price 1 or under	} At discretion.
Foreign Government and Corporation Bonds. Price 5 or under	} ¾ per cent. on Stock.
Foreign Government and Corporation Bonds. Price 10 or under	} 1½ per cent. on Stock.
Foreign Government and Corporation Bonds. Price 20 or under	"
Foreign Railway and other Bonds to Bearer. Price 20 or under	"
Foreign Government and Corporation Bonds. Price over 20	"
Foreign Railway and other Bonds to Bearer. Price over 20	"
Registered Stocks	½ per cent. on Money.
Shares, Registered or Bearer (other than Shares of \$50 or \$100 denomination dealt in in the American Market.)	"
Price 0 1 0 or under	At discretion.
Over 0 1 0 to 0 2 0	s. d. 0 ½ per Share.
" 0 2 0 to 0 3 6	0 ¾ "
" 0 3 6 to 0 5 0	0 1 "
" 0 5 0 to 0 15 0	0 1½ "
" 0 15 0 to £1 10 0	0 3 "
" £1 10 0 to £2 0 0	0 4½ "
" £2 0 0 to £3 0 0	0 6 "
" £3 0 0 to £4 0 0	0 7½ "
" £4 0 0 to £5 0 0	0 9 "
" £5 0 0 to £7 10 0	1 0 "
" £7 10 0 to £10 0 0	1 3 "
" £10 0 0 to £15 0 0	1 6 "
" £15 0 0 to £20 0 0	2 0 "
" £20 0 0 to £25 0 0	2 6 "
" £25 0 0 ...	½ per cent. on Money.

SHARES OF \$50 OR \$100 DENOMINATION dealt in in the American Market.

Price	\$5 or under	At discretion.
					s. d.
Over \$5 to \$25	0 6 per Share.
" \$25 to \$50	0 9 "
" \$50 to \$100	1 0 "
" \$100 to \$150	1 6 "
" \$150 to \$200	2 0 "

With 6d. rise for every \$50, or portion thereof, in price.

OPTIONS FOR MORE THAN ONE ACCOUNT .. As on bargains.

OPTIONS FOR ONE ACCOUNT OR LESS . }

BARGAINS IN PARTLY PAID STOCK OR SHARES
OF NEW ISSUES .. }

BARGAINS IN RIGHTS FOR CASH . }

POWERS OF ATTORNEY FOR INSCRIBED STOCK } At discretion

PROBATE AND OTHER VALUATIONS

SECURITIES MADE-UP OR MADE-DOWN .

SHORT-DATED SECURITIES (having five years or less to run)

TRANSFERS OF STOCKS AND SHARES)

SMALL BARGAINS. No lower Commission than £1 to be charged except in the case of—

- (a) Transactions amounting to less than £100 in value on which a Commission of not less than 10s. must be charged, or
- (b) Transactions amounting to less than £20 in value on which a Commission of not less than 5s. must be charged.

APPENDIX · B.

STAMP DUTIES AND FEES.

THE Stamp Duties payable on various instruments are governed by The Stamp Act, 1891 (54 & 55 Vict., Ch. 39), as amended by various Statutes; and the Fees payable on registration of companies by Section 244 of The Companies (Consolidation) Act, 1908, and Table B in the First Schedule to that Act. In the following pages particulars are given of the Duties and Fees which principally concern Companies.

A document which is not properly stamped cannot be put in evidence, except in criminal proceedings (Stamp Act, 1891, Section 14), and can only be stamped after the expiration of the due time upon payment of the prescribed penalties. If a document which should have been stamped is tendered in evidence while unstamped, a further penalty of One Pound is payable. A fine may also be imposed upon the person whose duty it was to see to the stamping (Section 15), and any person enrolling registering, or entering upon record an instrument not properly stamped becomes liable to a fine of Ten Pounds (Section 17). No document which ought to be filed with the Registrar of Companies may be received by him unless properly stamped.

Where a document comes within each of two categories chargeable with duty the Crown is only entitled to one of the duties, but it may choose the higher¹: *e.g.* when the document is both a promissory note and a marketable security.

The Fees payable on registering a Company with a Share Capital are prescribed by Section 244 of the Act of 1908 and Part I. of Table B in the First Schedule to that Act,² and in addition thereto a Capital Duty of One Pound per Hundred Pounds is imposed on a company to be registered with limited

¹ *Speyer Brothers v. Inland Revenue*, [1908] App. Ca. 92.

² The Fees are the same whether the Company is Limited by Shares, Limited by Guarantee and having a Share Capital, or Unlimited and having a Share Capital. Where the Company has not such a Capital the Fees are as shown on page 663, *infra*.

liability¹ by Section 112 of The Stamp Act, 1891, as amended by Section 7 of The Finance Act, 1899, and Section 39 of The Finance Act, 1920.

The Scale of Fee Stamps set out in Table B is as follows:—

For Registration of a Company whose Nominal Share Capital does not exceed £2000	£ s. d. 2 0 0
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For Registration of a Company whose Nominal Share Capital exceeds £2000, the following Fees, regulated according to the amount of Nominal Share Capital: that is to say—

For every £1000 of Nominal Share Capital, or part of £1000, up to £5000	1 0 0
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For every £1000 of Nominal Share Capital, or part of £1000, after the first £5000, up to £100,000	0 5 0
---	-------

For every £1000 of Nominal Share Capital, or part of £1000 after the first £100,000	0 1 0
---	-------

For Registration of any Increase of Share Capital made after the first Registration of the Company, the same Fees per £1000, or part of £1000, as would have been payable if the increased Share Capital had formed part of the original Share Capital at the time of Registration.²

Provided that no Company shall be liable to pay in respect of Nominal Share Capital, on Registration or afterwards, any greater amount of Fees than £50, taking into account, in the case of Fees payable on an Increase of Share Capital after Registration, the Fees paid on Registration.

From the above it will be seen that the maximum Fee of £50 is reached when the Nominal Capital of the Company is £525,000. Capital Duty, however, at the rate of One Pound per Hundred Pounds, is imposed in the case of companies with limited liability upon the full amount of the Nominal Capital, however large it may be.

The following Table indicates the amounts payable on registration of Limited Companies having a Share Capital and governed by special Articles of Association. In the total are included the deed stamps of Ten Shillings each payable on the Memorandum and Articles and the fee stamps of Five Shillings each which have to be impressed on the Articles, Notice of Situation of Registered Office (Form No. 4), Particulars respecting Directors (Form No. 9A), and Declaration of Compliance with the Requirements of The

¹ Note that the capital duty is not imposed in the case of unlimited companies.

² Where a company passed a resolution that the directors might increase the capital by an amount not exceeding £5,000,000, and the directors subsequently resolved on an increase of £200,000, it was held by Channell, J., that *ad valorem* duty was payable on the whole £5,000,000 on the date of the company's resolution (*Attorney-General v. Anglo-Argentine Tramways Co.*, [1909] 1 K. B. 677).

Companies (Consolidation) Act, 1908 (Form No. 41), which together amount to Two Pounds. These are the fees payable in the case of Private Companies; the further fees shown on page 652 are payable on the registration of Public Companies.

DUTIES AND FEES PAYABLE.

Nominal Share Capital.	<i>Ad Valore</i> Statement	Fee Stamp on Memorandum of Association.	Total Duty and Fees.
£100	£1 0	£2 0	£5 0 0
250	3 0	2 0	7 0 0
500	5 0	2 0	9 0 0
1,000	10 0	2 0	14 0 0
1,500	15 0	2 0	19 0 0
2,000	20 0	2 0	24 0 0
3,000	30 0	3 0	35 0 0
4,000	40 0	4 0	46 0 0
5,000	50 0	5 0	57 0 0
6,000	60 0	5 5	67 5 0
7,000	70 0	5 10	77 10 0
8,000	80 0	5 15	87 15 0
9,000	90 0	6 0	98 0 0
10,000	100 0	6 5	108 5 0
11,000	110 0	6 10	118 10 0
12,000	120 0	6 15	128 15 0
13,000	130 0	7 0	139 0 0
14,000	140 0	7 5	149 5 0
15,000	150 0	7 10	159 10 0
16,000	160 0	7 15	169 15 0
17,000	170 0	8 0	180 0 0
18,000	180 0	8 5	190 5 0
19,000	190 0	8 10	200 10 0
20,000	200 0	8 15	210 15 0
25,000	250 0	10 0	262 0 0
30,000	300 0	11 5	313 5 0
35,000	350 0	12 10	364 10 0
40,000	400 0	13 15	415 15 0
45,000	450 0	15 0	467 0 0
50,000	500 0	16 5	518 5 0
60,000	600 0	18 15	620 15 0
70,000	700 0	21 5	723 5 0
75,000	750 0	22 10	774 10 0
80,000	800 0	23 15	825 15 0
90,000	900 0	26 5	928 5 0
100,000	1,000 0	28 15	1,030 15 0
150,000	1,500 0	31 5	1,533 5 0
200,000	2,000 0	33 15	2,035 15 0
250,000	2,500 0	36 5	2,538 5 0
300,000	3,000 0	38 15	3,040 15 0
350,000	3,500 0	41 5	3,543 5 0

DUTIES AND FEES PAYABLE—*continued.*

Nominal Share Capital.	<i>Ad Valorem</i> Duty on Statement of Capital.	Fee Stamp on Memorandum of Association.	Total Duty and Fees.
£400,000	£4,000 0	£48 15	£4,045 15 0
450,000	4,500 0	46 5	4,548 5 0
500,000	5,000 0	48 15	5,050 15 0
525,000	5,250 0	50 0	5,302 0 0
600,000	6,000 0	50 0	6,052 0 0
700,000	7,000 0	50 0	7,052 0 0
800,000	8,000 0	50 0	8,052 0 0
900,000	9,000 0	50 0	9,052 0 0
1,000,000	10,000 0	50 0	10,052 0 0

And so on at the rate of One Pound further Capital Duty for every additional Hundred Pounds or fraction thereof.

In the case of Public Companies the following further Forms are required, a Five Shilling Fee Stamp being payable on each:— Notification of Consent to Act as Director (Form No. 42), Contract by Directors to Take and Pay for Qualification Shares, when not signed for in Memorandum (Form No. 42A), List of Persons who have Consented to be Directors (Form No. 43), and Prospectus or Statement in Lieu of Prospectus (Form No. 55). The Contract to Take Qualification Shares requires a stamp of Sixpence in respect of each signature where the Directors are required to hold Shares to the value of Five Pounds or more.

Before a Public Company can obtain a Certificate entitling it to commence business it must file either Form No. 44 or Form No. 44A (Declaration of Compliance with the Provisions as to Allotment and Minimum Subscription) according to whether a Prospectus or a Statement in Lieu of Prospectus has been filed. A Five Shilling Fee Stamp is required on the Form appropriate to the circumstances.

On registration of a Company Limited by Guarantee with a Share Capital the same fees are payable as in the case of a Company Limited by Shares (either Public or Private as the case may be) and the same Forms have to be filed, except that on allotment no Return of Allotments is required.

No Statement of Amount of Nominal Capital is required, and no *ad valorem* Capital Duty is payable on registration of an Unlimited Company with a Share Capital. Otherwise the duties and fees, and forms to be filed, are the same as in the case of a Company Limited by Guarantee having a Share Capital.

FEES ON INCREASE OF CAPITAL.

Within fifteen days after the confirmation of a Special Resolution increasing the Nominal Capital, or after the passing of an Ordinary or Extraordinary Resolution where the Articles of Association allow such, a Statement and Notice of the Increase must be filed with the Registrar¹ by Companies Limited by Shares or Companies Limited by Guarantee having a Share Capital. The Statement has to be impressed with a Duty Stamp at the rate of One Pound per cent. on the nominal amount of the increase, and the Notice of Increase with further Fee Stamps until the maximum of Fifty Pounds is reached and a Recording Stamp of Five Shillings. Interest at the rate of Five per centum per annum on the amount of the Capital Duty is payable from the date of the passing of the resolution if the duty is not paid within fifteen days (Stamp Act, 1891, Section 112; Finance Act, 1899, Section 7; Revenue Act, 1903, Section 5; Finance Act, 1920, Section 39).

On an increase of Capital by an Unlimited Company having a Share Capital, Notice of Increase must be filed and Fee Stamps impressed thereon (unless the maximum amount of Fifty Pounds has been paid) in accordance with the amount of the increase, but no Statement of Increase is required and no *ad valorem* Capital Duty is payable thereon.

FEES ON REGISTERING A COMPANY NOT HAVING A SHARE CAPITAL.

These Fees are prescribed by Section 244 and Part II. of Table B in the First Schedule, and are as follows:—

	£	s.	d.
For Registration of a Company whose Number of Members, as stated in the Articles, does not exceed Twenty	2	0	0
For Registration of a Company whose Number of Members, as stated in the Articles, exceeds Twenty, but does not exceed One Hundred	5	0	0
For Registration of a Company whose Number of Members, as stated in the Articles, exceeds One Hundred, but is not stated to be Unlimited, the above Fee of £5, with an additional 5s. for every Fifty Members or less number than Fifty Members after the first One Hundred.			
For Registration of a Company in which the Number of Members is stated in the Articles to be Unlimited	20	0	0
For Registration of any increase in the Number of Members made after the Registration of the Company, in respect of every Fifty Members, or less than Fifty Members, of such increase	0	5	0
Provided that no Company shall be liable to pay on the whole a greater Fee than £20 in respect of its Number of Members, taking into account the Fee paid on the first Registration of the Company.			

¹ If the company by resolution authorises the directors to increase the capital, the return must be made and duty paid even though the directors have not exercised the authority thus given (*Attorney-General v. Anglo-Argentine Tramways Co.*, [1900] 1 K. B. 677; see note on page 650, *supra*).

STAMP DUTIES AND FEES.

In addition thereto a Deed Stamp of Ten Shillings is required on both the Memorandum and Articles, and a Fee Stamp of Five Shillings each on the Articles, Notice of Situation of Office (Form No. 4), Particulars Respecting Directors (Form No. 9A), Declaration (Form No. 41), Notification of Consent to Act as Director (Form No. 42), List of Persons who have Consented to be Directors (Form No. 43), and Statement in Lieu of Prospectus (Form No. 55). On any increase in the number of members taking place, notice thereof must be filed with the Registrar on Form 11, which must be impressed with a Five Shilling Fee Stamp and a further Five Shillings in respect of each fifty or less number by which the membership of the company is increased, until a maximum amount (taking into account the fee payable on registration) of Twenty Pounds is reached.

OTHER FEES.

£ s. d.

For Registration of any Existing Company, except such Companies as are by the Consolidation Act exempted from payment of Fees in respect of Registration under that Act, the same Fee as is charged for Registering a New Company.

For Registering any Document required or authorised to be Registered, other than the Memorandum, or the Abstract required to be filed with the Registrar by a Receiver or Manager, or the Statement required to be sent to the Registrar by the Liquidator in a winding up in England

For making a Record of any fact authorised or required to be recorded by the Registrar

A Fee Stamp of Five Shillings is also payable on registration of each of the following documents:—

Notice of Change of Situation of Registered Office (Form No 5).

Copy Register of Directors—when change in registered Particulars of Directors occurs (Form No. 9).

Declaration of Compliance with Section 87 (requirements before commencing business: Form No. 44 where a Prospectus is issued; Form No. 44A where a Statement in Lieu of Prospectus is filed).

Contract of Sale in respect of Shares issued for a Consideration other than Cash.¹

Contract Constituting Title of Allottees to Allotment.¹

Prescribed Particulars of Contract under Section 88¹ (Form No. 52).

Return of Allotments (Form No. 45). Not required from Company not Having a Share Capital.

Report Prior to Statutory Meeting (Form No. 46).

Annual Return of Capital and Members (Form No. 6A).

Special and Extraordinary Resolutions (Forms No. 16 and 16A).

Notice of Increase of Capital (Form No. 10).

Notice of Consolidation, Division, or Conversion of Shares into Stock, or of Reconversion of Stock into Shares (Form No. 28).

¹ I.e. in addition to any *ad valorem* or other duty payable by way of stamp duty on the contract or particulars.

Statement by Private Company as to Commission pursuant to Section 89, Sub-section 1 (b) (Form No. 58).

Consent of Board of Trade to Change of Name.

Notice of Consent to Take Name of Existing Company (Form No. 14).

Copy of Altered Memorandum of Association.

Minute of Reduction of Capital.

Copy of Order of Court on Alteration of Memorandum, Reduction of Capital, Rectification of Register, Winding Up, Dissolution of Company, &c.

Notice of Increase in Number of Members by Company not Having a Share Capital (Form No. 11).

Particulars as to Debentures where more than One Issue is made of a Series (Form No. 48).

Memorandum of Satisfaction of Mortgage or Charge (Form No. 49).

Notice as to Appointment of Receiver or Manager (Form No. 53).

Notice of Ceasing to Act as Receiver or Manager (Form No. 57A).

Notice of Appointment of Liquidator (Form No. 39A).

Return of Final Meeting (Form No. 15).

VARIOUS STAMP DUTIES.

CONVEYANCE OR TRANSFER ON SALE.

The duty charged under this head applies to every instrument whereby any property, or any estate or interest in any property, upon the sale thereof, is transferred to or vested in a purchaser or any other person for him (Stamp Act, 1891, Section 54). It accordingly applies when the instrument is a conveyance of property or a transfer of shares,¹ and by Section 59 is extended also to *contracts* for the sale of property other than lands (unincumbered), goods, wares, merchandise, &c. (as to which see page 115, *supra*).

By The Finance (1909-10) Act, 1910 (Section 73), the duty was doubled except in the case of stocks and marketable securities and small sales of property other than stocks and marketable securities, and by Section 74 the duty is extended to gifts *inter vivos*, and is assessed upon the value of the property transferred,² for which purpose the deed must be submitted to the Commissioners of Inland Revenue for adjudication under Section 12 of The Stamp Act, 1891, but this provision does not apply to transfers on the appointment of new trustees (see page 118, *supra*).

¹ In the case of a sale of partly paid shares where calls were payable at fixed dates the Commissioners of Inland Revenue at one time made a claim that stamp duty was payable in respect of the calls; but this claim has been withdrawn.

² If "by reason of the inadequacy of the sum paid as consideration or other circumstances the conveyance or transfer confers a substantial benefit" on the transferee, the conveyance or transfer will be treated as a gift *inter vivos*. Thus if a person or firm transfers a business or property to a private company there will be no saving of stamp duty by fixing the consideration at a sum that is obviously inadequate (Section 74, Sub-section 5).

By The Finance Act, 1920, Section 36, Sub-section 1, the above exception from the doubled duty in favour of stocks and marketable securities was removed, and the double duty is now payable thereon. The duty must be denoted by impressed stamps, and is as follows:—

(A) In all cases of transfers of stock or marketable securities—

Where the consideration does not exceed £5, the Instrument of Transfer must have a stamp of the value of				£	s.	d.
Exceeds £5 and does not exceed £10	...	...	...	0	1	0
" 10	"	15	...	0	2	0
" 15	"	20	...	0	3	0
" 20	"	25	...	0	4	0
" 25	"	50	...	0	5	0
" 50	"	75	...	0	10	0
" 75	"	100	...	0	15	0
" 100	"	125	...	1	0	0
" 125	"	150	...	1	5	0
" 150	"	175	...	1	10	0
" 175	"	200	...	1	15	0
" 200	"	225	...	2	0	0
" 225	"	250	...	2	5	0
" 250	"	275	...	2	10	0
" 275	"	300	...	2	15	0
And for every additional £50 or part of £50	...	...	...	3	0	0

(b) In cases other than transfers of stock or marketable securities duty is payable at the same rate, except that if the amount or value of the consideration for the sale does not exceed £500, and the instrument contains a statement in the prescribed form certifying that the transaction does not form part of a larger transaction or series of transactions the consideration for which exceeds £500, the duty is at half the above rate.

(c) In the case of sales for value the duty is assessed on the consideration paid; in the case of gifts or transfers for less than the full value the duty is on the value of the property.¹

An Instrument of Transfer of a Share in a Colonial Register, unless executed in the United Kingdom, is exempt from the British Stamp Duty (Section 36).

Transfers by way of Mortgage of any Stock, Shares, Funded Debt, or marketable security of any kind are chargeable, if the loan be disclosed in the Deed of Transfer, with *ad valorem* Mortgage Duty. If the loan be not disclosed in the Deed of Transfer, so as to attract the foregoing duty, there must be two instruments to disclose the transaction; and where the second instrument, under hand only, is given, qualifying an apparently absolute transfer of stock or marketable security, that instrument is chargeable with the duty of Sixpence, and the Deed of Transfer with Ten Shillings.

Transfers of any Stock, Shares, or marketable security of any kind, otherwise than on Sale or Mortgage, and not being

¹ See last preceding note.

"a voluntary disposition *inter vivos*" are liable to a duty of Ten Shillings.

Transfers of Mortgages or Debentures (not being marketable securities) are chargeable with a duty of Sixpence per cent., and if the amount lent is increased with the addition of the same duty on the amount of the increase as on an original Mortgage. But transfers of marketable securities (not transferable by delivery) bear duty according to the foregoing scale.

When property is conveyed either in consideration of any debt, or charged with or subject to any payment, the debt or payment is treated as part of the consideration, and *ad valorem* duty is payable on this also (Stamp Act, 1891, Section 57).

In the case of Cost Book Mines the duty is Sixpence on each Transfer of Shares.

Transfers must be stamped within thirty days after execution, or, if executed abroad, within thirty days after being first received in the United Kingdom.

MORTGAGES, BONDS, AND DEBENTURES.

Mortgages, Bonds, Debentures, and similar securities transferable only by instrument of transfer, and not payable to bearer or otherwise transferable by delivery, and being the only or principal or primary security, are chargeable with duty according to the following scale:—

			s.	d.
Where the amount secured ¹ does not exceed	£10	..	0	3
Exceeding £10 and not exceeding	£25	..	0	8
"	25	"	1	3
"	50	"	2	6
"	100	"	3	9
"	150	"	5	0
"	200	"	6	3
"	250	"	7	6
"	300	"	2	6
"	£100 or fractional part of £100	..	2	6

An instrument being a collateral, auxiliary, additional, or substituted security (other than an equitable mortgage), or by way of further assurance, requires stamping with duty at the rate of Sixpence for every £100 or fractional part of £100 of the amount secured until the maximum duty of Ten Shillings is reached (Revenue Act, 1903, Section 7).

¹ This includes any bonus or premium which the company undertakes to pay on redemption in an event not dependent on the volition of the company. Thus if a debenture for £100 is redeemable at £105 the debenture must be stamped as securing £105 (*Rowell & Son v. Commissioners of Inland Revenue*, [1897] 2 Q. B. 194), but if redeemable at a fixed date at par, with an option on the part of the company to redeem earlier at a premium, no duty is payable on the premium (*Knight's Deep, Limited v. Commissioners of Inland Revenue*, [1900] 1 Q. B. 217; see Alpe's "Law of Stamp Duties," Eighteenth Edition, pages 182 and 203).

Where a Debenture is re-issued under the power contained in Section 104, or another Debenture is issued in place of a redeemed Debenture, it must, for the purposes of Stamp Duty, be treated as a new Debenture; but a person ignorant of the fact that the Debenture has been previously issued may produce it in evidence in proceedings for enforcing his security (see page 247).

On filing Particulars of Debentures or other Mortgages or Charges requiring registration under the Act (see page 271, *supra*) the following charges are also made as "the prescribed fee" authorised by Section 93, Sub-section 2:—

For registering under Section 93 any Mortgage or Charge created by a company—

Where the amount of the Mortgage or Charge does not exceed £200, Ten Shillings.

Where it exceeds £200, One Pound.

For registering Particulars of a Series of Debentures under Section 93, Sub-section 3—

Where the total amount secured by the whole Series does not exceed £200, Ten Shillings.

Where it exceeds £200, One Pound.

For inspecting the Register of Mortgages and Charges kept by the Registrar of Companies the fee is One Shilling in each case.

Debentures to Bearer and other Bonds and Securities payable to bearer or otherwise transferable by delivery are charged, under the heading of Marketable Securities Transferable by Delivery, with duty at the rate of Four Shillings for every Ten Pounds or fractional part of Ten Pounds of the money secured¹; or when such security is given in substitution for a like security stamped in conformity with the law in force at the time when the last-mentioned security became subject to duty, duty is payable on the substituted security at the rate of Two Shillings for every Twenty Pounds or fractional part of Twenty Pounds of the money secured.¹ A security transferable by delivery issued in lieu of a security transferable only by instrument of transfer is chargeable with the higher rate of duty. Instruments stamped as substituted securities should be denoted with "duty paid" stamps indicating the rate of duty paid on the originals.

Marketable Securities Transferable by Delivery made or issued by or on behalf of any Foreign State or Government, or Foreign or Colonial Municipal Body, Corporation, or Company which are transferred, assigned, or negotiated in the United

¹ The original duty was doubled by The Finance (1909-10) Act, 1910, Section 76, and again doubled as above by The Finance Act, 1920, Section 38; but the increased duty is not payable if the securities &c. were duly stamped before the first-named Act came into force.

Kingdom are liable to the duty of Four Shillings for every Ten Pounds or fractional part of Ten Pounds secured.¹ Foreign Share Warrants and Stock Certificates to Bearer are liable to the like duty.

Under the provisions of the Treaty of Peace with Turkey of July, 1923, certain securities issued under the Treaty are exempt by Section 37 of The Finance Act, 1924, from duty in the territory of the contracting parties.

Where, in the case of Marketable Securities Transferable by Delivery, other than Colonial Government Securities, the amount secured is to be paid off within one year after the date on which the duty is payable the rate is only Sixpence, or if the term is more than one year, but does not exceed three years, the rate is One Shilling.² The date for redemption must be conspicuously stated on the face of the instrument.

Instruments to Bearer, not being Share Warrants or Stock Certificates to Bearer, transferring Foreign Shares or Stock in the United Kingdom, not otherwise charged, are chargeable with a duty of Threepence for every Twenty-five Pounds or fractional part of Twenty-five Pounds of the nominal value of the Shares or Stock.

A "Marketable Security" includes any Mortgage, Bond, Debenture, Covenant, or other security which is capable of being sold in any Stock Market in the United Kingdom³ (see Alpe's "Law of Stamp Duties," Eighteenth Edition (1925) pages 185, 191, 194, and 270).

Debentures Renewed by Endorsement.—Where Bonds, Debentures, or other similar securities maturing at fixed dates are renewed by endorsement on the original securities during the currency thereof, the memoranda or instruments of renewal are chargeable, if under hand only, with the duty of Sixpence, or if under seal with duty at the rate of Sixpence for every £100, or part of £100, of the amount secured (with a maximum of Ten Shillings); but where the renewals are effected after maturity the Commissioners claim duty as upon new securities, although it is submitted that such claims should be opposed on the ground that actually no new security is given or created. (On the subject of registration see page 271, *supra*.)

Discharge &c. of Securities.—A reconveyance, release, discharge, surrender, or renunciation of a security by way of mortgage, or of the money thereby secured, requires an *ad valorem* Stamp of

¹ See footnote on previous page.

² The original duty of Threepence and Sixpence imposed by The Finance (1909-10) Act, 1910, Section 13, was doubled as above by The Finance Act, 1920, Section 38.

³ A document is frequently both a promissory note and a marketable security. The Crown may then require duty to be paid at the higher rate: i.e. as on a marketable security (*Speyer Brothers v. Inland Revenue*, [1908] App. Ca. 92).

Sixpence per £100 (Stamp Act, 1891, under "Mortgage," sub-head 5); but a receipt endorsed on a Debenture acknowledging that the money secured has been paid and satisfied is not a discharge so as to require this stamp.¹

A *Trust Deed for Securing Debentures* is not regarded as a collateral security, but if the Debentures are duly stamped it will be passed on adjudication if impressed with a Ten Shilling Stamp (but see page 268, *supra*). A Deed securing Debenture Stock requires an *ad valorem* Stamp as a Mortgage, but the Certificates of Title to the Stock do not require a stamp.

Loan Capital.—By The Finance Act, 1899 (Section 8), "any local authority, corporation, company, or body of persons, formed or established in the United Kingdom," proposing to issue any Loan Capital, must before the issue thereof deliver to the Commissioners of Inland Revenue a statement of the amount proposed to be secured, stamped with duty at the rate of Two Shillings and Sixpence for every £100 or fraction of £100 to be secured; but any duty paid on the Trust Deed or other document (*e.g.* Debenture) securing the Loan Capital may be deducted. "Loan Capital" in this section includes any Debenture Stock or Funded Debt, by whatever name known, or any capital which is borrowed or has the character of borrowed money, whether it is in the form of Stock or in any other form, but does not include any overdraft at the bank or other loan raised for a merely temporary purpose for a period not exceeding twelve months. Companies incorporated by Private Act of Parliament are within the section.² Deferred warrants securing arrears of debenture interest are not within the section even though interest is payable on the amounts specified.³ The Commissioners claim on companies formed under the Companies Acts in respect of money received on deposit at notice. Section 10 of The Finance Act, 1907, allows a rebate of Two Shillings per £100 if it be shown that the loan has been or is being applied to the consolidation or conversion of an existing loan.

MISCELLANEOUS INFORMATION AS TO STAMPS.

Agreements.—The duty on Agreements under Hand is Sixpence, and on those under Seal Ten Shillings. But if the Agreement is for the sale of any property other than land (unincumbered), goods, wares, or merchandise, &c., it is chargeable with *ad valorem* Conveyance Duty. (This is discussed at length at page 115, *supra*.) An Agreement under hand the matter whereof is not of the value of Five Pounds, or for the hire of a labourer, artificer,

¹ Thomas Firth & Sons v. Inland Revenue Commissioners, [1904] 2 K. B. 205.

² Attorney-General v. Regent's Canal and Dock Co., [1904] 1 K. B. 263.

³ Attorney-General v. South Wales Electrical Power Co., [1919] 2 K. B. 636.

manufacturer, or menial servant, or relating to the sale of any goods, does not require any stamp.

A *Guarantee* is an Agreement, and subject to the same exemptions.

An *Underwriting Letter* is an Agreement. Where, however, the document is under seal and contains an undertaking to pay a definite sum of money, covenant duty at the rate of Two Shillings and Sixpence for every £100 is charged.

A *Share Certificate* does not require a stamp.

Deeds under Seal, where not chargeable with *ad valorem* duty, require a Ten Shilling Stamp.

	£	s.	d.
<i>A Memorandum of Association</i> is chargeable with	0	10	0
<i>Articles of Association</i>	0	10	0
<i>Share Warrants</i> , ¹ per cent. of nominal value	3	0	0
<i>Letters of Allotment and Letters of Renunciation</i> ² —			
Under £5	0	0	1
£5 and over ³	0	0	6
<i>Scrip Certificates and Provisional Certificates</i> ⁴	0	0	2
<i>Instruments of Proxy</i> —			
For one Meeting ⁵	0	0	1
For more than one Meeting	0	10	0
<i>Power of Attorney</i>	0	10	0
<i>Receipt for £2 or over</i> ⁶	0	0	2

Contract Notes for the sale or purchase of any Stock or Marketable Security of the value of over £5, but under £100, Sixpence; from £100 to £500, One Shilling; from £500 to £1000, Two Shillings; from £1000 to £1500, Three Shillings; from £1500 to £2500, Four Shillings; from £2500 to £5000, Six Shillings; from £5000 to £7500, Eight Shillings; from £7500 to £10,000, Ten Shillings; from £10,000 to £12,500, Twelve Shillings; from £12,500 to £15,000, Fourteen Shillings; from £15,000 to £17,500, Sixteen Shillings; from £17,500 to £20,000, Eighteen Shillings; exceeding £20,000, One Pound. In case of a "carry over," however, only one stamp is necessary, although the transaction is in form both a sale and purchase. Contracts giving an option

¹ The duty on British Share Warrants was doubled as above by Section 38 of The Finance Act, 1920. By the combined effect of The Finance Act, 1890, The Finance (1900-1910) Act, 1910, and The Finance Act, 1920, Share Warrants of Foreign and Colonial Corporations assigned, transferred, or negotiated in the United Kingdom, require a stamp of Four Shillings for every Ten Pounds or fraction of Ten Pounds of the nominal value of the Stock or Shares included in the Warrant.

² Applied to fractions of a share by The Revenue Act, 1909 (Section 9).

³ Increased from One Penny by The Finance Act, 1890.

⁴ Finance Act, 1920, Section 35. A receipt for an instalment written on a scrip certificate duly stamped does not require a further stamp (London and Westminster Bank v. Commissioners of Inland Revenue, [1900] 1 Q. B. 106). Scrip for fractions of a share require this stamp (Revenue Act, 1909, Section 9).

⁵ These, if executed in the United Kingdom, must be stamped before execution. If executed abroad, they may be stamped within thirty days after receipt here (Finance Act, 1907, Section 9).

⁶ Finance Act, 1920, Section 34; see also page 663.

require stamps to the amount of half the duties above mentioned, but if a double option is given this is reckoned as two contracts. If an option given under a duly stamped contract is exercised the stamp on the contract note resulting carries only one half of the duty which would be payable if not made in pursuance of a duly stamped option. A separate stamp is necessary for each description of stock. No brokerage can be recovered unless a note has been made and duly stamped, and there are heavy penalties for failing to make and deliver the proper contract notes duly stamped. This duty is not payable when the immediate principal is acting as broker or agent for some other person if he is a member of a Stock Exchange in the United Kingdom or entered on the list of *bonâ fide* stockbrokers kept at Somerset House (Finance (1909-10) Act, 1910, Sections 77 to 79).

Time for Stamping.—Some instruments are required to be stamped before execution or issue, of which the following are the most common:—Bills of Exchange and Promissory Notes, Contract Notes, Letters of Allotment and Renunciation, Proxies, Receipts, Scrip and Scrip Certificates, Share Warrants, Voting Papers executed in the United Kingdom. Where Contracts for the Sale of Land provide that no objection or requisition shall be made on account of any deed or document dated prior to The Customs and Inland Revenue Act, 1888, being unstamped or insufficiently stamped, the Commissioners of Inland Revenue will only allow, them to be stamped after execution upon payment of the full penalty of Ten Pounds. Instruments not being of the above description requiring an *ad valorem* stamp must be stamped within thirty days after their execution, or if executed abroad within thirty days after their first arrival in the United Kingdom. This right is given to proxies executed abroad by Section 9 of The Finance Act, 1907. There is no statutory provision allowing Agreements under Hand liable to the fixed duty of Sixpence to be stamped without penalty, but all such documents may, by the regulations of the Commissioners of Inland Revenue, be stamped within fourteen days after execution. If not duly stamped within the proper time a document may subsequently be stamped on payment of the unpaid duty and a penalty of Ten Pounds, and also, by way of further penalty, if the unpaid duty exceeds Ten Pounds, of interest on such duty at five per centum per annum. The Commissioners may, however, mitigate or remit the penalty upon good cause being shown.

Adhesive Stamps, where the duty does not exceed Two Shillings and Sixpence, are available for the following purposes, among others:—Agreements under Hand the duty on which is Sixpence, Bills of Exchange payable on demand, at sight, on presentation, or within three days after date or sight, and Foreign

Bills and Notes, Charter-Parties, Cheques, Contract Notes, Certified Copies and Extracts from Registers of Births, &c., Delivery Orders, Leases of Dwelling-houses at rents not exceeding Forty Pounds per annum, or Furnished Dwelling-houses or Apartments, and duplicates or counterparts thereof, Letters of Renunciation, Notarial Acts, Policies other than Sea or Life, Protests of Bills of Exchange, Proxies liable to duty of One Penny, Receipts, Transfers of Shares in Cost Book Mines, Voting Papers, and Warrants for Goods; but for Bills of Exchange (payable otherwise than as above) and Contract Notes specially appropriated Stamps are requisite. Adhesive Stamps must be cancelled by the first person executing or using the instrument, except in the case of Foreign Bills and Notes, which must be cancelled by the person into whose hands they come, and Charter-Parties, which must be cancelled by the persons last executing the same, or by whose execution it is completed as a binding contract. If not so cancelled, the document is not deemed to be duly stamped unless it is proved that the stamp is affixed at the proper time.

It is to be noted that a receipt for (*inter alia*) wage or salary does not require a receipt stamp (Stamp Act, Schedule, as amended by The Finance Act, 1924, Section 36). The Board of Inland Revenue consider that fees paid to directors of companies, whether fixed by the Articles or voted in General Meeting, are within the exemption; but fees paid to Auditors are not within the exemption.

Impressed Stamps must be placed on Bills of Exchange payable otherwise than on demand, at sight, on presentation, or within three days after date or sight; Promissory Notes, Letters of Allotment, Scrip, and Provisional Certificates; on all Deeds, and on all instruments charged with *ad valorem* duty.

Spoiled Stamps.—An allowance is made in respect of Stamps inadvertently spoiled within two years from the manuscript date upon the prescribed statutory declaration being made and presented at the Stamp Office (Cancel Branch), Somerset House. Transfers which have been spoiled or become useless within two years, if unsigned, may be exchanged on mere presentation. A spoiled instrument must be presented in a complete state, without any mutilation whatever.

The Commissioners of Inland Revenue have authorised the Superintendent of Stamps at the Stock Exchange to make an allowance in respect of Contract Note Stamps to the brokers issuing the notes upon their first furnishing him with such evidence as he may deem satisfactory to the effect that the Stamps were spoiled in consequence of an error or errors in the notes to which they had been affixed.

APPENDIX C.

TABLE A:

Being the Statutory Regulations for the Management of Companies Limited by Shares and Registered without Special Articles in the First Schedule to The Companies (Consolidation) Act, 1908.

PRELIMINARY.

1. In these Regulations, unless the context otherwise requires, expressions defined in The Companies (Consolidation) Act, 1908, or any statutory modification thereof in force at the date at which these Regulations become binding on the company, shall have the meanings so defined; and words importing the singular shall include the plural, and *vice versa*, and words importing the masculine gender shall include females, and words importing persons shall include bodies corporate.

The following words are defined in Section 285 --

"Company," "Articles," "Memorandum," "Document," "Share," "Debenture," "Books and Papers," "The Court," "Director," and "Prospectus."

BUSINESS.

2. The directors shall have regard to the restrictions on the commencement of business imposed by Section 87 of The Companies (Consolidation) Act, 1908, if and so far as those restrictions are binding upon the company.

The operation of the section extends to all except private companies, which are entitled to commence business as soon as they are incorporated. A company proposing to offer any of its shares to the public for subscription should adopt special Articles fixing the minimum subscription and authorising the payment of underwriting commissions (see pages 158 and 174, *supra*).

SHARES.

3. Subject to the provisions, if any, in that behalf of the Memorandum of Association of the company, and without prejudice to any special rights previously conferred on the holders of existing shares in the company, any share in the company may be issued with such preferred, deferred, or other special rights, or such restrictions, whether in regard to dividend,

voting, return of share capital, or otherwise, as the company may from time to time by special resolution determine.

It is not necessary that the Memorandum should contain the power to issue preferred shares (*Andrews v. Gas Meter Co.*, [1897] 1 Ch. 361). That case only dealt with preferential rights conferred on new capital; but the grounds of the decision appear to apply equally to original capital remaining unissued. If it is intended to issue preference of deferred shares in the first instance, a special Article should be adopted defining their rights.

4. If at any time the share capital is divided into different classes of shares, the rights attached to any class (unless otherwise provided by the terms of issue of the shares of that class) may be varied with the consent in writing of the holders of three fourths of the issued shares of that class, or with the sanction of an extraordinary resolution passed at a separate general meeting of the holders of the shares of the class. To every such separate general meeting the provisions of these regulations relating to general meetings shall *mutatis mutandis* apply, but so that the necessary quorum shall be two persons at least, holding or representing by proxy one third of the issued shares of the class.

This clause is common in special Articles. The rights of a class cannot be varied if they have been determined by the Memorandum of Association (*Ashbury v. Watson*, [1885] 30 Ch. D. 370), unless the Memorandum itself provides for the variation of such rights (*Underwood v. London Music Hall*, [1901] 2 Ch. 309), or the variation is effected under Section 45 or 120 see also note to Clause 52.

5. No share shall be offered to the public for subscription except upon the terms that the amount payable on application shall be at least five per cent. of the nominal amount of the share; and the directors shall, as regards any allotment of shares, duly comply with such of the provisions of Sections 85 and 88 of The Companies (Consolidation) Act, 1908, as may be applicable thereto.

Section 85 relates to the Minimum Subscription (see pages 48 and 171, *supra*).

Section 88 provides for the filing of (a) a return of the allotments, and (b) any contracts constituting the title of the allottee to such allotment the case of shares issued as fully or partly paid (see page 197, *supra*).

6. Every person whose name is entered as a member in the Register of Members shall, without payment, be entitled to a certificate under the common seal of the company, specifying the share or shares held by him and the amount paid up thereon, provided that in respect of a share or shares held jointly by several persons the company shall not be bound to issue more than one certificate, and delivery of a certificate for a share to one of several joint holders shall be sufficient delivery to all.

No settlement on the London Stock Exchange will be granted until the share certificates are ready for delivery. A shareholder is entitled to have his certificate issued to him "within a reasonable time" (*Burdett v. Standard Exploration Co.*, [1900] 16 Times L. R. 112). Section 92 gives a shareholder a right to receive his certificate within two months (see page 183, *supra*).

7. If a share certificate is defaced, lost, or destroyed, it may be renewed on payment of such fee, if any, not exceeding one shilling, and on such terms, if any, as to evidence and indemnity as the directors think fit.

Under Section 23 the certificate is *prima facie* evidence of the title of the member to the shares therein specified, and is frequently deposited as security for a loan. The power in this clause should therefore be exercised with great caution.

8. No part of the funds of the company shall be employed in the purchase of or in loans upon the security of the company's shares.

The London Stock Exchange requires some such clause, but as regards the purchase of shares it only states the law (*Trevor v. Whitworth*, [1888] 12 App. Ca. 409).

If a company lends on its own shares it cannot foreclose, but must realise them by sale.

LIEN.

9. The company shall have a lien on every share (not being a fully paid share) for all moneys (whether presently payable or not) called or payable at a fixed time in respect of that share, and the company shall also have a lien on all shares (other than fully paid shares) standing registered in the name of a single person for all moneys presently payable by him or his estate to the company; but the directors may at any time declare any share to be wholly or in part exempt from the provisions of this clause. The company's lien, if any, on a share shall extend to all dividends payable thereon.

This clause gives no lien on fully paid shares, the London Stock Exchange objecting to such a lien, and, except in regard to money payable in respect of the shares (*s.e.* calls or instalments), the lien only attaches in cases of shares solely held. This is because shares jointly held are usually held upon trust. Special Articles usually make the lien more extensive and include shares held on joint account. As to lien see page 10, *supra*.

10. The company may sell, in such manner as the directors think fit, any shares on which the company has a lien, but no sale shall be made unless some sum in respect of which the lien exists is presently payable, nor until the expiration of fourteen days after a notice in writing, stating and demanding payment of such part of the amount in respect of which the lien exists as is presently payable, has been given to the registered holder for the time being of the share, or the person entitled by reason of his death or bankruptcy to the share.

11. The proceeds of the sale shall be applied in payment of such part of the amount in respect of which the lien exists as is presently payable, and the residue shall (subject to a like lien for sums not presently payable as existed upon the shares prior to the sale) be paid to the person entitled to the shares at the date of the sale. The purchaser shall be registered as the holder of the shares, and he shall not be bound to see to the application of the purchase money, nor shall his title to the shares be affected by any irregularity or invalidity in the proceedings in reference to the sale.

CALLS ON SHARES.

12. The directors may from time to time make calls upon the members in respect of any moneys unpaid on their shares, provided that no call shall exceed one fourth of the nominal amount of the share, or be payable at less than one month from the last call; and each member shall (subject to receiving at least fourteen days' notice specifying the time or times of payment) pay to the company, at the time or times so specified, the amount called on his shares.

This is a variation of the clause in Table A of 1862 limiting the amount of each call as required by the London Stock Exchange, and reducing the notice from twenty-one days to fourteen days. It also omits to declare that the call must be paid at the place appointed by the directors. The general law is that a debtor must go to his creditor to pay him; but in a case under special Articles it was held that the omission to name a place of payment rendered the call invalid (*Cawley & Co.*, [1889] 42 Ch. D. 200). As to calls generally see page 188, *supra*.

It is to be noted that the clause declaring that a call shall be deemed to be made at the time of the resolution authorising it (old Table A, Clause 5) is omitted.

13. The joint holders of a share shall be jointly and severally liable to pay all calls in respect thereof.

The several liability thus created continues as regards calls made during the joint lives after the death of one of the joint holders, and judgment against one will not release the others, as would be the case if the debt were joint only (*Kendal v. Hamilton*, [1879] 4 App. Ca. 504).

14. If a sum called in respect of a share is not paid before or on the day appointed for payment thereof, the person from whom the sum is due shall pay interest upon the sum at the rate of five pounds per centum per annum from the day appointed for the payment thereof to the time of the actual payment, but the directors shall be at liberty to waive payment of that interest wholly or in part.

In special Articles the rate of interest is often made ten pounds per cent., so as to be more or less penal. The power to waive interest is a fiduciary one, to be exercised for the benefit of the company. It should be used only as part of a compromise or for other good consideration.

15. The provisions of these regulations as to payment of interest shall apply in the case of nonpayment of any sum which, by the terms of issue of a share, becomes payable at a fixed time, whether on account of the amount of the share, or by way of premium, as if the same had become payable by virtue of a call duly made and notified.

This clause was not in the original Table A. The terms of the prospectus or of allotment generally constitute a contract sufficient to give the company a cause of action; but the special remedy of forfeiture and the liability to pay interest would not apply but for this clause.

16. The directors may make arrangements on the issue of shares for a difference between the holders in the amount of calls to be paid and in the times of payment.

This clause, which is not in the original Table A, takes advantage of the power conferred by Section 39. The result is that a company may have shares of the same or different classes some of which are fully paid and some only partly paid. Without such a provision calls must be made on all shareholders equally (*Preston v. Grand Collier Dock Co.*, [1840] 11 Sm. 327).

17. The directors may, if they think fit, receive from any member willing to advance the same all or any part of the moneys uncalled and unpaid upon any shares held by him; and upon all or any of the moneys so advanced may (until the same would, but for such advance, become presently payable) pay interest at such rate (not exceeding, without the sanction of the company in general meeting, six per cent.) as may be agreed upon between the member paying the sum in advance and the directors.

This is substantially the same as Clause 7 of the original Table A, and is a useful clause. Interest on the sum so paid in advance can be paid by the company even if there are no profits (*Lock v. Queensland Investment Co.*, [1896] App. Ca. 461). Under a similar article *Joyce, J.*, held that the amounts paid in advance of calls could not be repaid to shareholders (*London and Northern Steamship Co. v. Farmer*, [1914] W. N. 200).

TRANSFER AND TRANSMISSION OF SHARES.

18. The instrument of transfer of any share in the company shall be executed both by the transferor and transferee, and the transferor shall be deemed to remain a holder of the share until the name of the transferee is entered in the Register of Members in respect thereof.

Execution by the transferee is required to evidence his agreement to become a member of the company. As to transfer see page 109, *supra*.

As to rectification of the Register if the company fails or delays to give effect to a transfer see pages 95 to 99, *supra*.

19. Shares in the company shall be transferred in the following form, or in any usual or common form which the directors shall approve:—

A. B., of _____, in consideration of the sum of _____ pounds paid to me by C. D., of _____ (hereinafter called "the said transferee"), do hereby transfer to the said transferee the share [or shares] numbered _____ in the undertaking called the _____ COMPANY, LIMITED, to hold unto the said transferee, his executors, administrators, and assigns, subject to the several conditions on which I held the same at the time of the execution hereof: and I, the said transferee, do hereby agree to take the said share [or shares] subject to the conditions aforesaid.

As witness our hands the _____ day of _____.

Witness to the signatures of, &c.

The use of this form is not made compulsory if the directors approve of a substituted form, but it seems the directors may reject any transfer not in this form. It does not require execution as a deed, but provides for a witness. Attestation should never be omitted, but where a deed is not required it is not essential to the validity of an assignment or transfer. An unattested transfer would not be in any "usual or common form," and should not be approved by the directors. The clause is directory only, and the omission of particulars, such as the numbers of the shares if in the circumstances not material, will not entitle the directors to refuse to register the transfer (*re Lettichy & Christopher*, [1904] 1 Ch. 815).

20. The directors may decline to register any transfer of shares, not being fully paid shares, to a person of whom they do not approve, and may also decline to register any transfer of shares on which the company has a lien. The directors may also suspend the registration of transfers during the fourteen days immediately preceding the ordinary general meeting in each year. The directors may decline to recognise any instrument of transfer unless (a) a fee not exceeding two shillings and sixpence is paid to the company in respect thereof, and (b) the instrument of transfer is accompanied by the certificate of the shares to which it relates, and such other evidence as the directors may reasonably require to show the right of the transferor to make the transfer.

As to refusing to register transfers see page 204.

See also note to Clause 22.

The provisions of the above clause are in accordance with the requirements of the London Stock Exchange.

21. The executors or administrators of a deceased sole holder of a share shall be the only persons recognised by the company as having any title to the share. In the case of a share registered in the names of two or more holders, the survivors or survivor, or the executors or administrators of the deceased survivor, shall be the only persons recognised by the company as having any title to the share.

Clauses 21 to 23 are generally referred to as "the Transmission Clauses" (see page 214, *supra*).

The latter part of the clause recognises the fact that joint holding is generally only in the case of trusts; but the company takes no notice of the trust (see pages 92, 212, and 217, *supra*).

22. Any person becoming entitled to a share in consequence of the death or bankruptcy of a member shall, upon such evidence being produced as may from time to time be required by the directors, have the right either

to be registered as a member in respect of the share, or, instead of being registered himself, to make such transfer of the share as the deceased or bankrupt person could have made; but the directors shall, in either case, have the same right to decline or suspend registration as they would have had in the case of a transfer of the share by the deceased or bankrupt person before the death or bankruptcy.

See Section 20, which provides for the transfer of shares by the representative of a deceased member.

Without this provision that the directors can refuse registration, a person entitled to a share by transmission can insist on being registered, for Clause 20, authorising the rejection of transfers, does not apply to persons claiming by transmission (*Bentham Mills Spinning Co.*, [1879] 11 Ch. D. 900). But in order that the directors may effectively "decline" to register, a resolution of the board to that effect is necessary. So that if the directors are divided in opinion equally, and the chairman has no casting vote, and no resolution is therefore possible, registration can be insisted on (*Hackney Pavilion, Limited*, *in re*, [1923] 1 Ch. 270).

23. A person becoming entitled to a share by reason of the death or bankruptcy of the holder shall be entitled to the same dividends and other advantages to which he would be entitled if he were the registered holder of the share, except that he shall not, before being registered as a member in respect of the share, be entitled in respect of it to exercise any right conferred by membership in relation to meetings of the company.

This clause was not in the original Table A. Executors or a trustee in bankruptcy will often not care to become members where the shares are partly paid. The estate of the former holder will then remain liable for any calls, but the personal representative can collect the dividends &c. Special Articles frequently do not allow the personal representatives even to receive dividends unless they take the shares into their own names.

FORFEITURE OF SHARES.

24. If a member fails to pay any call or instalment of a call on the day appointed for payment thereof, the directors may, at any time thereafter during such time as any part of such call or instalment remains unpaid, serve a notice on him requiring payment of so much of the call or instalment as is unpaid, together with any interest which may have accrued.

Forfeiture is a reduction of capital, but, as Table A has statutory force, there can be no objection. As to forfeiture generally see page 434, *supra*.

25. The notice shall name a further day (not earlier than the expiration of fourteen days from the date of the notice) on or before which the payment required by the notice is to be made, and shall state that in the event of nonpayment at or before the time appointed the shares in respect of which the call was made will be liable to be forfeited.

This clause being penal, all its requirements must be most carefully followed to render a forfeiture valid.

26. If the requirements of any such notice as aforesaid are not complied with, any share in respect of which the notice has been given may, at any time thereafter before the payment required by the notice has been made, be forfeited by a resolution of the directors to that effect.

27. A forfeited share may be sold or otherwise disposed of on such terms and in such manner as the directors think fit, and at any time before a sale or disposition the forfeiture may be cancelled on such terms as the directors think fit.

The forfeiture cannot be cancelled and the shareholder restored to the Register without his consent (*re Exchange Trust, Limited*, *Larkworthy's Case*, [1903] 1 Ch. 711).

28. A person whose shares have been forfeited shall cease to be a member in respect of the forfeited shares, but shall, notwithstanding, remain liable to pay to the company all moneys which, at the date of forfeiture, were presently payable by him to the company in respect of the shares, but his liability shall cease if and when the company receive payment in full of the nominal amount of the shares.

This liability, having accrued before forfeiture, continues until barred by the Statute of Limitations, the period being twenty years from the date of the call (Section 14, Sub-section 2). The shareholder ceases to be a member, and cannot be placed on the list of contributories, unless the liquidation is within a year of the forfeiture, when he may be placed on the "B" List, but he may be sued for calls payable at the time of forfeiture (*Ladies' Dress Association v. Pullbrook*, [1900] 2 Q. B. 370).

As to the company's right against the purchaser for the amount unpaid on the shares see page 137, *supra*.

29. A statutory declaration in writing that the declarant is a director of the company, and that a share in the company has been duly forfeited on a date stated in the declaration, shall be conclusive evidence of the facts herein stated as against all persons claiming to be entitled to the share, and that declaration, and the receipt of the company for the consideration, if any, given for the share on the sale or disposition thereof, shall constitute a good title to the share, and the person to whom the share is sold or disposed of shall be registered as the holder of the share, and shall not be bound to see to the application of the purchase money, if any, nor shall his title to the share be affected by any irregularity or invalidity in the proceedings in reference to the forfeiture, sale, or disposal of the share.

This is substantially the same as Clause 22 of the original Table A, and enables the company to give a good title, notwithstanding any irregularity in the forfeiture. Special Articles usually dispense with the statutory declaration.

30. The provisions of these regulations as to forfeiture shall apply in the case of nonpayment of any sum which, by the terms of issue of a share, becomes payable at a fixed time, whether on account of the amount of the share, or by way of premium, as if the same had been payable by virtue of a call duly made and notified.

See note to Clause 15, *supra*.

CONVERSION OF SHARES INTO STOCK.

31. The directors may, with the sanction of the company previously given in general meeting, convert any paid-up shares into stock, and may, with the like sanction, reconvert any stock into paid-up shares of any denomination.

As to powers for altering share capital see Section 41. Notice of conversion of shares into stock must be given to the Registrar (Section 42). Under this clause the sanction of an ordinary resolution will enable the directors to convert shares into stock or to reconvert stock into shares.

32. The holders of stock may transfer the same, or any part thereof, in the same manner and subject to the same regulations as and subject to which the shares from which the stock arose might, previously to conversion, have been transferred, or as near thereto as circumstances admit; but the directors may from time to time fix the minimum amount of stock transferable, and restrict or forbid the transfer of fractions of that minimum, but the minimum shall not exceed the nominal amount of the shares from which the stock arose.

In the absence of a prescribed minimum, stock measured in shillings and pence may be transferred. The usual restriction is to forbid the transfer of fractions of a pound.

33. The holders of stock shall, according to the amount of the stock held by them, have the same rights, privileges, and advantages as regards dividends, voting at meetings of the company, and other matters as if they held the shares from which the stock arose, but no such privilege or advantage (except participation in the dividends and profits of the company) shall be conferred by any such aliquot part of stock as would not, if existing in shares, have conferred that privilege or advantage.

34. Such of the regulations of the company (other than those relating to share warrants) as are applicable to paid-up shares shall apply to stock, and the words "share" and "shareholder" therein shall include "stock" and "stock-holder."

The Stock Exchange at one time objected to share warrants to bearer being issued in respect of stock, and this clause in like manner excepts the provisions as to share warrants.

SHARE WARRANTS.

35. The company may issue warrants, and accordingly the directors may in their discretion, with respect to any share which is fully paid up, on application in writing signed by the person registered as holder of the share, and authenticated by such evidence, if any, as the directors may from time to time require as to the identity of the person signing the request, and on receiving the certificate, if any, of the share and the amount of the stamp duty on the warrant and such fee as the directors may from time to time require, issue under the company's seal a warrant, duly stamped, stating that the bearer of the warrant is entitled to the shares therein specified, and may provide by coupons, or otherwise, for the payment of dividends, or other moneys, on the shares included in the warrant.

The clauses as to Share Warrants must be excluded in the case of private companies.

Power to issue share warrants is given by Section 37. A share warrant can be issued only in respect of fully paid shares. By Section 33 of the Act of 1867 the amount of stamp duty on every share warrant was fixed at three times the amount of the *ad valorem* duty which would be chargeable on a deed transferring the shares or stock specified in the warrant if the consideration for the transfer were the nominal value of such shares or stock. This is not repeated in the Act of 1908, but the same duty is imposed by the Schedule to The Stamp Act, 1891, and under The Finance Act, 1920, Section 38, is £3 per cent.

As to share warrants and the penalty for issuing them not properly stamped see pages 186 and 187, *supra*.

36. A share warrant shall entitle the bearer to the shares included in it, and the shares shall be transferred by the delivery of the share warrant, and the provisions of the regulations of the company in respect to transfer and transmission of shares shall not apply thereto.

Compare Section 37 of the Act (see page 186, *supra*).

37. The bearer of a share warrant shall, on surrender of the warrant to the company for cancellation, and on payment of such sum as the directors may from time to time prescribe, be entitled to have his name entered as a member in the Register of Members in respect of the shares included in the warrant.

This follows Section 37 of the Act.

38. The bearer of a share warrant may at any time deposit the warrant at the office of the company, and so long as the warrant remains so deposited the depositor shall have the same right of signing a requisition for calling a meeting of the company, and of attending and voting and exercising the other privileges of a member at any meeting held after the

expiration of two clear days from the time of deposit, as if his name were inserted in the Register of Members as the holder of the shares included in the deposited warrant. Not more than one person shall be recognised as depositor of the share warrant. The company shall, on two days' written notice, return the deposited share warrant to the depositor.

39. Subject as herein otherwise expressly provided, no person shall, as bearer of a share warrant, sign a requisition for calling a meeting of the company, or attend, or vote, or exercise any other privilege of a member at a meeting of the company, or be entitled to receive any notices from the company; but the bearer of a share warrant shall be entitled in all other respects to the same privileges and advantages as if he were named in the Register of Members as the holder of the shares included in the warrant, and he shall be a member of the company.

It would seem from Clause 114 that a holder of a share warrant is entitled to receive notices of general meetings of the company if he gives to the company an address to which notices can be sent to him. But how are the company's officials to know whether the person giving the address is still the bearer of any warrants?

40. The directors may from time to time make rules as to the terms on which, if they shall think fit, a new share warrant or coupon may be issued by way of renewal in case of defacement, loss, or destruction.

These rules should be drawn up on or before the first issue of any share warrant. As the bearer of a share warrant is absolutely entitled to the shares named in it, a satisfactory indemnity should be given before a new warrant is issued in all cases where the old warrant is not surrendered.

ALTERATION OF CAPITAL.

41. The directors may, with the sanction of an extraordinary resolution of the company, increase the share capital by such sum, to be divided into shares of such amount, as the resolution shall prescribe.

As to increase of capital see page 420, *supra*.

Clause 26 of the original Table A requires the directors to have the sanction of a special resolution, but there is nothing in the Consolidation Act to prevent the company from increasing its capital by means of an ordinary resolution (see Section 41). As to increases of capital by the directors see page 421, *supra*.

42. Subject to any direction to the contrary that may be given by the resolution sanctioning the increase of share capital, all new shares shall, before issue, be offered to such persons as at the date of the offer are entitled to receive notices from the company of general meetings in proportion, as nearly as the circumstances admit, to the amount of the existing shares to which they are entitled. The offer shall be made by notice specifying the number of shares offered, and limiting a time within which the offer, if not accepted, will be deemed to be declined, and after the expiration of that time, or on the receipt of an intimation from the person to whom the offer is made that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the company. The directors may likewise so dispose of any new shares which (by reason of the ratio which the new shares bear to shares held by persons entitled to an offer of new shares) cannot, in the opinion of the directors, be conveniently offered under this article.

This clause follows Clause 27 of the original Table A. As to who are entitled to receive notices of general meetings see Clause 114.

43. The new shares shall be subject to the same provisions with reference to the payment of calls, lien, transfer, transmission, forfeiture, and otherwise, as the shares in the original share capital.

44. The company may by special resolution—

- (A) Consolidate and divide its share capital into shares of larger amount than its existing shares:
- (B) By subdivision of its existing shares, or any of them, divide the whole or any part of its share capital into shares of smaller amount than is fixed by the Memorandum of Association, subject, nevertheless, to the provisions of paragraph (d) of Sub-section (1) of Section 41 of The Companies (Consolidation) Act, 1908:
- (C) Cancel any shares which, at the date of the passing of the resolution, have not been taken or agreed to be taken by any person:
- (D) Reduce its share capital in any manner and with, and subject to, any incident authorised, and consent required, by law.

As to the above see pages 420 and 424 *et seq.*, *supra*. The Act by Section 41 gives the powers necessary for (A) (B) and (C), and by Section 46 those for (D).

Before a company can do any of the above things it must be authorised to do so by its Articles as originally framed or as altered by special resolution.

It is to be noted that for (B) and (D) a special resolution is by the Act necessary. In other cases, unless the Articles require a special resolution, it is not necessary.

The proviso in Section 41, Sub-section 1 (d), is as follows:—"So, however, that in the subdivision the proportion between the amount paid and the amount, if any, unpaid on each reduced share shall be the same as it was in the case of the share from which the reduced share is derived."

GENERAL MEETINGS.

45. The statutory general meeting of the company shall be held within the period required by Section 65 of The Companies (Consolidation) Act, 1908.

As to general meetings see page 354 *et seq.*, *supra*. The Act provides in Section 65 that every Company Limited by Shares and registered after the 1st January, 1901, shall, within a period of not less than one month nor more than three months from the date at which the company is entitled to commence business, hold a general meeting of the members of the company, which shall be called "the statutory meeting" (Sub-section 1).

The members present at the statutory meeting are at liberty to discuss any matter relating to the formation of the company or arising out of the report required by Sub-section 2 to be furnished, whether previous notice has been given or not, but no resolution of which notice has not been given in accordance with the Articles of Association may be passed (Sub-section 7).

46. A general meeting shall be held once in every year at such time (not being more than fifteen months after the holding of the last preceding general meeting) and place as may be prescribed by the company in general meeting, or, in default, at such time in the month following that in which the anniversary of the company's incorporation occurs, and at such place as the directors shall appoint. In default of a general meeting being so held, a general meeting shall be held in the month next following, and may be

convened by any two members in the same manner as nearly as possible as that in which meetings are to be convened by the directors.

Section 64 requires a general meeting to be held once at least in every calendar year, and not more than fifteen months after the last preceding general meeting.

Companies have frequently failed to comply with the Act, and the calling of an extraordinary meeting by requisition did not always meet the case for certain business: e.g. the retirement and re-election of directors and the production of a balance sheet and report can only be transacted at ordinary general meetings. This clause provides a remedy more effective than taking proceedings in a Police Court. The Court may also, on the application of any member, call or direct the calling of a general meeting if default has been made in complying with Section 64 (see Sub-section 2).

47. The above-mentioned general meetings shall be called ordinary meetings; all other general meetings shall be called extraordinary.

48. The directors may, whenever they think fit, convene an extraordinary general meeting, and extraordinary general meetings shall also be convened on such requisition, or, in default, may be convened by such requisitionists as provided by Section 66 of The Companies (Consolidation) Act, 1908. If at any time there are not within the United Kingdom sufficient directors capable of acting to form a quorum, any director or any two members of the company may convene an extraordinary general meeting in the same manner as nearly as possible as that in which meetings may be convened by the directors.

As to extraordinary general meetings and requisitions see page 338, *supra*.

PROCEEDINGS AT GENERAL MEETINGS.

49. Seven days' notice at the least (exclusive of the day on which the notice is served or deemed to be served, but inclusive of the day for which notice is given), specifying the place, the day, and the hour of meeting, and in case of special business the general nature of that business, shall be given in manner hereinafter mentioned, or in such other manner, if any, as may be prescribed by the company in general meeting, to such persons as are, under the regulations of the company, entitled to receive such notices from the company; but the non-receipt of the notice by any member shall not invalidate the proceedings at any general meeting.

As to notices of general meetings and the business to be done see pages 302 and 306, *supra*.

As to what is special business see Clause 50, *infra*.

The notice is deemed to be served on the day on which the letter would be delivered in the ordinary course of post (Clause 110). In many cases this will add two days to the time required. The day of service is not to be counted in reckoning the seven days' notice, but the day of meeting may be counted.

50. All business shall be deemed special that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting, with the exception of sanctioning a dividend, the consideration of the accounts, balance sheets, and the ordinary report of the directors and auditors, the election of directors and other officers in the place of those retiring by rotation, and the fixing of the remuneration of the auditors.

The business of which notice must be given is everything not referred to in the exceptions above, including all business done at extraordinary meetings. The business referred to in the exceptions may be transacted although not mentioned in the notice convening the meeting.

51. No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business; save as herein otherwise provided, three members personally present shall be a quorum.

The corresponding clause of the original Table A provides for a quorum varying with the number of shareholders, the minimum quorum being five. Under this Table, as above, to constitute a quorum there must be three members personally present. Only those competent to vote on the business before the meeting should be reckoned (*re* Greymouth-Point Elizabeth Railway and Coal Co., [1904] 1 Ch. 32). A resolution reducing the quorum for the purpose of enabling those not interested to pass a resolution in which one of the directors is interested is invalid (*North Eastern Insurance Co.*, [1910] 1 Ch. 198).

52. If within half an hour from the time appointed for the meeting a quorum is not present, the meeting, if convened upon the requisition of members, shall be dissolved. In any other case it shall stand adjourned to the same day in the next week at the same time and place, and if at the adjourned meeting a quorum is not present within half an hour from the time appointed for the meeting the members present shall be a quorum.

Clause 38 of the original Table A provided that if a quorum is not present at the adjourned meeting the meeting shall be adjourned *non dir.* Under the present clause if two members are present at the adjourned meeting they can transact business; but one member cannot form a meeting (*Sharp v. Davies*, [1876] 2 Q. B. D. 27). A resolution passed at a meeting at which a quorum is not present is invalid (*Romford Canal Co.*, [1883] 24 Q. B. D. 85). The provision as to members present at an adjourned meeting being a quorum does not apply to class meetings unless expressly incorporated in the Article dealing with such meetings (*Hemans v. Hotchkiss Co.*, [1899] 1 Ch. 115).

53. The chairman, if any, of the board of directors shall preside as chairman at every general meeting of the company.

54. If there is no such chairman, or if at any meeting he is not present within fifteen minutes after the time appointed for holding the meeting or is unwilling to act as chairman, the members present shall choose some one of their number to be chairman.

55. The chairman may, with the consent of any meeting at which a quorum is present (and shall if so directed by the meeting), adjourn the meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place. When a meeting is adjourned for ten days or more notice of the adjourned meeting shall be given as in the case of an original meeting. Save as aforesaid, it shall not be necessary to give any notice of an adjournment or of the business to be transacted at an adjourned meeting.

As to adjournments see pages 361 and 363, *supra*.

The chairman has no power to stop or adjourn a meeting without its consent (*National Dwellings Society v. Sykes*, [1901] 3 Ch. 159). Nor could a majority of the meeting, under the old Table A, adjourn without the chairman's consent (*Salsbury Gold Mining Co. v. Hathorn*, [1897] App. (n. 268)). The above clause, however, requires the chairman to adjourn if so directed by the meeting.

56. At any general meeting a resolution put to the vote of the meeting shall be decided on a show of hands, unless a poll is (before or on the declaration of the result of the show of hands) demanded by at least three members, and, unless a poll is so demanded, a declaration by the chairman that a resolution has, on a show of hands, been carried, or carried

unanimously, or by a particular majority, or lost, and an entry to that effect in the book of the proceedings of the company, shall be conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against such resolution.

As to a poll and as to demanding a poll in the case of special resolutions see pages 370 and 391, *supra*.

The demand for a poll must be "before or on the declaration of the result of the show of hands." It seems that a demand for a poll after the meeting has proceeded to other business would be too late; but the words "on the declaration" will no doubt be read reasonably, and any attempt to prevent a poll by passing rapidly to other business would fail.

57. If a poll is duly demanded, it shall be taken in such manner as the chairman directs, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded.

58. In the case of an equality of votes, whether on a show of hands or on a poll, the chairman of the meeting at which the show of hands takes place or at which the poll is demanded shall be entitled to a second or casting vote.

59. A poll demanded on the election of a chairman or on a question of adjournment shall be taken forthwith. A poll demanded on any other question shall be taken at such time as the chairman of the meeting directs.

VOTES OF MEMBERS.

60. On a show of hands every member present in person shall have one vote. On a poll every member shall have one vote for each share of which he is the holder.

As to voting see page 370, *supra*.

Clause 44 of the original Table A contains a graduated scale, diminishing the voting power of the holders of large blocks of shares. But, as a member can transfer blocks of shares to nominees, and thus get the maximum voting power (*Pender v. Liffington*, [1877] 6 Ch. D. 70), it is as well to adopt the clause given above, which has become nearly universal in special Articles.

61. In the case of joint holders the vote of the senior who tenders a vote, whether in person or by proxy, shall be accepted to the exclusion of the votes of the other joint holders, and for this purpose seniority shall be determined by the order in which the names stand in the Register of Members.

This clause follows Clause 46 of the original Table A.

62. A member of unsound mind or in respect of whom an order has been made by any Court having jurisdiction in lunacy, may vote, whether on a show of hands or on a poll, by his committee, *curator bonis*, or other person in the nature of a committee or *curator bonis* appointed by that Court, and any such committee, *curator bonis*, or other person may, on a poll, vote by proxy.

63. No member shall be entitled to vote at any general meeting unless all calls or other sums presently payable by him in respect of shares in the company have been paid.

The words "or other sums" refer to the amount due on allotment or to instalments payable at specified dates without the necessity of a call being made. Neither a call made but not yet payable, nor the fact that he is indebted to the company otherwise than on account of the shares, will affect a member's right to vote.

64. On a poll votes may be given either personally or by proxy.

As to proxies see page 375, *supra*.

65. The instrument appointing a proxy shall be in writing under the hand of the appointor or of his attorney duly authorised in writing, or, if the appointor is a corporation, either under the common seal or under the hand of an officer or attorney so authorised. No person shall act as a proxy unless either he is entitled on his own behalf to be present and vote at the meeting at which he acts as proxy, or he has been appointed to act at that meeting as proxy for a corporation.

Clause 49 of the original Table A provides that the signature to the instrument appointing a proxy shall be attested by one or more witnesses, in which case failure to attest makes the instrument invalid (*Harben v. Phillips*, [1883] 23 Ch. D. 14). The provision that a corporation may appoint a proxy under the hand of an officer will enable a foreign company which has no common seal to be represented at the meeting. Section 68 makes the right of "a company" to be represented by one of its own officers or any other person general, but in the Act "a company" means a company formed under the Companies Acts (Section 285).

66. The instrument appointing a proxy, and the power of attorney or other authority, if any, under which it is signed or a notarially certified copy of that power or authority, shall be deposited at the registered office of the company not less than forty-eight hours before the time for holding the meeting at which the person named in the instrument proposes to vote, and in default the instrument of proxy shall not be treated as valid.

As to stamp duty see page 375, *supra*.

The power of attorney authorising a person to appoint proxies requires a ten-shilling stamp.

67. An instrument appointing a proxy may be in the following form, or in any other form which the directors shall approve:—

COMPANY, LIMITED.

I, _____, of _____, in the
County of _____, being a Member of
the _____ COMPANY, LIMITED, hereby
appoint _____, of _____, as
my proxy to vote for me and on my behalf at the [ordinary
or extraordinary, as the case may be] general meeting of the
company to be held on the _____ day of _____, and
at any adjournment thereof.

Signed this _____ day of _____

This form differs in several particulars from that contained in the original Table A, and does not require a witness to attest the signature.

DIRECTORS.

68. The number of the directors and the names of the first directors shall be determined in writing by a majority of the subscribers of the Memorandum of Association.

This clause agrees substantially with Clauses 52 and 53 of the original Table A. It is not necessary for the signatories to meet: they can appoint without meeting if the majority concur (*Great Northern Salt Works*, [1890] 44 Ch. D. 472). By Clause 63 the company can vary the number, and by Clause 85 the directors can appoint additional directors. Special Articles often name the first directors, in which case the provisions of Section 72 must be complied with (see page 203, *supra*).

69. The remuneration of the directors shall from time to time be determined by the company in general meeting.

As to directors' remuneration see page 303, *supra*. The income tax on directors' remuneration must be deducted from their fees and not paid out of the company's assets (*Boschoek Proprietary Co. v. Fuke*, [1906] 1 Ch. 148). Their travelling expenses must not be paid by the company unless the Articles specially so provide or such payments have been authorised by resolution of a general meeting (*Young v. Naval, Military, and Civil Service Co-operative Society of South Africa*, [1905] 1 K. B. 687).

70. The qualification of a director shall be the holding of at least one share in the company, and it shall be his duty to comply with the provisions of Section 73 of The Companies (Consolidation) Act, 1908.

As to directors' qualification see page 298, *supra*. Special Articles usually provide for a substantial qualification, and that the first directors may act before acquiring such qualification.

POWERS AND DUTIES OF DIRECTORS.

71. The business of the company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the company, and may exercise all such powers of the company as are not, by The Companies (Consolidation) Act, 1908, or any statutory modification thereof for the time being in force, or by these Articles, required to be exercised by the company in general meeting, subject nevertheless to any regulation of these Articles, to the provisions of the said Act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made.

This clause is sufficient to enable the directors to carry on the business of the company. It is common in Special Articles to set out at great length various powers, but this is unnecessary, and more often has the effect of limiting than of extending the powers. In *Marshall's Valve Gear Co.*, [1909] 1 Ch. 267, *Neville, J.*, held that with power such as here given the company could control the discretion of the directors, distinguishing *Automatic Self-Cleansing Filter Syndicate v. Cunningham*, [1906] 2 Ch. 34; but in *Salmon v. Quin & Axtens, Limited*, [1909] App. Ch. 442, the House of Lords held that directors cannot be controlled under an Article in this form without a special resolution.

As to the payment of preliminary expenses see page 161, *supra*.

As to the exercise of the directors' powers see page 311, *supra*.

72. The directors may from time to time appoint one or more of their body to the office of managing director or manager for such term and at such remuneration (whether by way of salary, or commission, or participation in profits, or partly in one way and partly in another) as they may think fit, and a director so appointed shall not, while holding such office, be subject to retirement by rotation, or taken into account in determining the rotation of retirement of directors; but his appointment shall be subject to determination *ipso facto* if he ceases from any cause to be a director, or if the company in general meeting shall resolve that his tenure of the office of managing director or manager be determined.

Directors cannot delegate their powers unless expressly authorised to do so (*Howard's Case*, [1806] 1 Ch. 361). But Clause 91 contains a power to delegate, under which a managing director may be given all necessary powers. If there is power to delegate, a stranger is entitled to assume that the power has been properly exercised (*Biggerstaff*

v. Rowatt's Wharf, [1896] 2 Ch. 93). Under this clause, even if the directors appoint a managing director for a term of years, the company in general meeting can dismiss him at any time (*per Swinfen Eady, J.*, in *Nelson v. Nelson & Co.*, [1914] 1 K. B. at page 779). The old Table A contained no power to appoint a managing director.

73. The amount for the time being remaining undischarged of moneys borrowed or raised by the directors for the purposes of the company (otherwise than by the issue of share capital) shall not at any time exceed the issued share capital of the company without the sanction of the company in general meeting.

The power to borrow is conferred on the directors by Clause 71 if the company itself possesses the power; as to which see pages 220 and 226, *supra*. The Stock Exchange Committee require a limit on the borrowing power of directors which is here imposed. The company can by ordinary resolution increase the limit. As to borrowing in excess of the limit see pages 221 and 222, *supra*.

74. The directors shall duly comply with the provisions of The Companies (Consolidation) Act, 1908, or any statutory modification thereof for the time being in force, and in particular with the provisions in regard to the registration of the particulars of mortgages and charges affecting the property of the company, or created by it, and to keeping a Register of the Directors, and to sending to the Registrar of Companies an annual list of members, and a summary of particulars relating thereto, and notice of any consolidation or increase of share capital, or conversion of shares into stock, and copies of special resolutions, and a copy of the Register of Directors and notifications of any changes therein.

This clause is a useful reminder. The various matters referred to are dealt with in the foregoing pages under their respective heads.

75. The directors shall cause minutes to be made in books provided for the purpose—

- (a) Of all appointments of officers made by the directors;
- (b) Of the names of the directors present at each meeting of the directors and of any committee of the directors;
- (c) Of all resolutions and proceedings at all meetings of the company, and of the directors, and of committees of directors;

And every director present at any meeting of directors or committee of directors shall sign his name in a book to be kept for that purpose.

Section 71 provides that minutes of all proceedings of general meetings and of the directors shall be kept, and that such minutes shall be evidence of the proceedings. But such evidence is not conclusive, and can be rebutted by evidence to the contrary (*Indian Zedone Co.*, [1884] 26 Ch. D. 70). In proceedings against a company or its directors the absence from the minute book of any reference to a subject is usually treated as *prima facie* evidence that it was not brought before the board.

THE SEAL.

76. The seal of the company shall not be affixed to any instrument except by the authority of a resolution of the board of directors, and in the presence of at least two directors and of the secretary or such other person as the directors may appoint for the purpose; and those two directors and secretary or other person as aforesaid shall sign every instrument to which the seal of the company is so affixed in their presence.

As to the Seal see page 102, *supra*.

Persons dealing with a company have notice of the contents of its Articles, and should see that the sealing of a deed is properly attested. Special Articles often allow the attestation of one director and the secretary to suffice.

88. The quorum necessary for the transaction of the business of the directors may be fixed by the directors, and unless so fixed shall (when the number of directors exceeds three) be three.

See page 311, *supra*. When the number of directors is three a majority of them must attend to form a quorum (*York Tramways Co. v. Willows*, [1874] 8 Q. B. D. 686).

89. The continuing directors may act notwithstanding any vacancy in their body, but if and so long as their number is reduced below the number fixed by or pursuant to the regulations of the company as the necessary quorum of directors, the continuing directors may act for the purpose of increasing the number of directors to that number or of summoning a general meeting of the company, but for no other purpose.

The number of directors will be fixed "pursuant to the regulations" under Clause 78 or 88. Unless the Articles contain provisions such as the above, the directors cannot transact any business when their number is reduced below the minimum prescribed by the regulations of the company (*Alma Spinning Co.*, [1881] 16 Ch. D. 681). It seems a single director can, under Clause 85, appoint additional directors, for by Clause 1 the plural includes the singular.

90. The directors may elect a chairman of their meetings, and determine the period for which he is to hold office; but if no such chairman is elected, or if at any meeting the chairman is not present within five minutes after the time appointed for holding the same, the directors present may choose one of their number to be chairman of the meeting.

91. The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit; any committee so formed shall in the exercise of the powers so delegated conform to any regulations that may be imposed on them by the directors.

The directors cannot delegate their powers unless the Articles authorise them to do so (*Howard's Case*, [1806] 1 Ch. 561). A committee of directors may consist of one person (*Taurine Co.*, [1884] 25 Ch. D. 118).

92. A committee may elect a chairman of their meetings; if no such chairman is elected, or if at any meeting the chairman is not present within five minutes after the time appointed for holding the same, the members present may choose one of their number to be chairman of the meeting.

93. A committee may meet and adjourn as they think proper. Questions arising at any meeting shall be determined by a majority of votes of the members present, and in case of an equality of votes the chairman shall have a second or casting vote.

Unless otherwise determined by the committee, a majority must attend to form a quorum (*York Tramways Co. v. Willows*, [1874] 8 Q. B. D. 686).

94. All acts done by any meeting of the directors or of a committee of directors, or by any person acting as a director, shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director.

This clause amplifies Section 74; as to its effects see page 315, *supra*.

DIVIDENDS AND RESERVE.

95. The company in general meeting may declare dividends, but no dividend shall exceed the amount recommended by the directors.

As to dividends see page 401 *et seq.*, *supra*.

96. The directors may from time to time pay to the members such interim dividends as appear to the directors to be justified by the profits of the company.

There is no provision in the original Table A enabling the directors to pay an interim dividend. The declaration of an interim dividend can be cancelled by the directors at any time before payment, and does not create a debt (*Lagunas Nitrate Syndicate v. Schroeder*, [1901] 85 L. T. 22).

97. No dividend shall be paid otherwise than out of profits.

The whole question of dividends is discussed at page 401 *et seq.*, *supra*.

98. Subject to the rights of persons, if any, entitled to shares with special rights as to dividends, all dividends shall be declared and paid according to the amounts paid on the shares, but if and so long as nothing is paid up on any of the shares in the company dividends may be declared and paid according to the amounts of the shares. No amount paid on a share in advance of calls shall, while carrying interest, be treated for the purposes of this Article as paid on the share.

By the corresponding clause of the original Table A dividends are made payable to members "in proportion to their shares"—that is to say, according to the nominal amount of the shares—so that partly paid shares are entitled to the same dividend as fully paid shares (*Oakbank Oil Co. v. Crum*, [1883] 8 App. (n. 65)). The provisions of the above clause had, however, become almost universal in special Articles, so that the dividend on a share with £5 paid is half that on a share with £10 paid.

99. The directors may, before recommending any dividend, set aside out of the profits of the company such sums as they think proper as a reserve or reserves, which shall, at the discretion of the directors, be applicable for meeting contingencies, or for equalising dividends, or for any other purpose to which the profits of the company may be properly applied, and pending such application may, at the like discretion, either be employed in the business of the company or be invested in such investments (other than shares of the company) as the directors may from time to time think fit.

This is a variation of Clause 74 of the original Table A.

As to Reserve Fund see page 414, *supra*.

100. If several persons are registered as joint holders of any share any one of them may give effectual receipts for any dividend payable on the share.

101. Notice of any dividend that may have been declared shall be given in manner hereinafter mentioned to the persons entitled to share therein.

Clause 76 of the original Table A provides that dividends unclaimed for three years may be forfeited by the directors for the benefit of the company; but such a provision must be omitted if a quotation on the London Stock Exchange is desired.

As to giving notice see Clauses 110 to 114, *infra*.

102. No dividend shall bear interest against the company.

A dividend is a debt, and no interest is payable on a debt except by agreement.

ACCOUNTS.

103. The directors shall cause true accounts to be kept—

Of the sums of money received and expended by the company and the matter in respect of which such receipt and expenditure takes place, and

Of the assets and liabilities of the company.

This varies Clause 78 of the original Table A.

As to accounts and the penalties for falsification see page 396 *et seq.*, *supra*.

104. The books of account shall be kept at the registered office of the company, or at such other place or places as the directors think fit, and shall always be open to the inspection of the directors.

105. The directors shall from time to time determine whether and to what extent and at what times and places and under what conditions or regulations the accounts and books of the company or any of them shall be open to the inspection of members not being directors, and no member (not being a director) shall have any right of inspecting any account or book or document of the company except as conferred by Statute or authorised by the directors or by the company in general meeting.

Members of a company have a statutory right to inspect the Register of Members (Section 30) and the Register of Mortgages (Section 100). In practice a company never allows the members to inspect the directors' minute book or its books of account unless a committee of inspection is appointed.

106. Once at least in every year the directors shall lay before the company in general meeting a profit and loss account for the period since the preceding account or (in the case of the first account) since the incorporation of the company, made up to a date not more than six months before such meeting.

"Every year" means "calendar" year (Gibson v. Barton, [1875] L. R. 10 Q. B. 320).

It is to be observed that the elaborate subdivision of items in the accounts and balance sheet required by the original Table A are no longer directed.

107. A balance sheet shall be made out in every year and laid before the company in general meeting made up to a date not more than six months before such meeting. The balance sheet shall be accompanied by a report of the directors as to the state of the company's affairs, and the amount which they recommend to be paid by way of dividend, and the amount, if any, which they propose to carry to a reserve fund.

As to balance sheets see page 396, *supra*.

As to fraudulent balance sheets see page 399, *supra*. A provision in the Articles that the directors may form an internal reserve fund, not disclosed in the balance sheet or the directors' report, but of which particulars are to be given to the auditors, would seem to be valid, but a provision that the auditors are in no event to disclose the same to the shareholders is inconsistent with Section 113, and invalid (Newton v. Birmingham Small Arms Co., [1906] 2 Ch. 146).

108. A copy of the balance sheet and report shall, seven days previously to the meeting, be sent to the persons entitled to receive notices of general meetings in the manner in which notices are to be given hereunder.

Two copies must be sent to the Secretary of the Share and Loan Department of the London Stock Exchange if an official quotation is desired.

AUDIT.

109. Auditors shall be appointed and their duties regulated in accordance with Sections 112 and 113 of The Companies (Consolidation) Act, 1908, or any statutory modification thereof for the time being in force.

As to Auditors, their appointment and their duties, see page 345 *et seq.*, *supra*.

NOTICES.

110. A notice may be given by the company to any member either personally or by sending it by post to him to his registered address, or (if he has no registered address in the United Kingdom) to the address, if any, within the United Kingdom supplied by him to the company for the giving of notices to him. Where a notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the notice, and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post.

There is no provision in the original Table A with regard to sending notices to members resident abroad. In the absence of special provisions such members are not entitled to notice (*Union Hill Silver Co.*, [1870] 22 L. T. 200). Note, that if there are members in distant parts of the United Kingdom, the course of post may be two days, and in some of the Hebrides more.

111. If a member has no registered address in the United Kingdom, and has not supplied to the company an address within the United Kingdom for the giving of notices to him, a notice addressed to him and advertised in a newspaper circulating in the neighbourhood of the registered office of the company, shall be deemed to be duly given to him on the day on which the advertisement appears.

Notices of general meetings need not be given to the persons referred to in this clause (see Clause 114).⁹ It appears to relate to matters personal to the members, such as notices of calls, forfeitures, and the like, and in such cases the notice must be "addressed" to the member in question, which presumably means that he must be named in the advertisement, as, for instance, "To John Jones, Thomas Smith, and Ozias Midwinter, members of the X. Y. Z. Company, Limited. Take notice that"

112. A notice may be given by the company to the joint holders of a share by giving the notice to the joint holder named first in the Register in respect of the share.

113. A notice may be given by the company to the persons entitled to a share in consequence of the death or bankruptcy of a member by sending it through the post in a prepaid letter addressed to them by name, or by the title of representatives of the deceased, or trustee of the bankrupt, or by any like description, at the address, if any, in the United Kingdom supplied for the purpose by the persons claiming to be so entitled, or (until such an address has been so supplied) by giving the notice in any manner in which the same might have been given if the death or bankruptcy had not occurred.

In the absence of special provisions (such as are contained in Clause 114) notice need not be sent to a deceased member, nor need his legal personal representatives be served with notice unless they have themselves become members by formal registration (*Allen v. Gold Reefs of West Africa*, [1900] 1 Ch. 656). It would seem that under the above clause, if no address has been supplied by the representatives, notice of

general meetings must be sent addressed to the deceased or bankrupt at his address as appearing in the Register or at the address last supplied by him (under Clause 111), but failing any such address he is not entitled to notice, and his representatives are therefore not entitled to notice. Where a company continued to send notices to the first named of two joint holders after knowledge of his death and forfeited unclaimed dividends the forfeiture was held to be invalid (*Ward v. Dublin North City Milling Co.*, [1919] I. R. 5).

114. Notice of every general meeting shall be given in some manner hereinbefore authorised to (a) every member of the company (including bearers of share warrants) except those members who (having no registered address within the United Kingdom) have not supplied to the company an address within the United Kingdom for the giving of notices to them, and also to (b) every person entitled to a share in consequence of the death or bankruptcy of a member who, but for his death or bankruptcy, would be entitled to receive notice of the meeting. No other persons shall be entitled to receive notices of general meetings.

The provisions of this clause apply to notices of general meetings only. Bearers of share warrants are entitled to notice of general meetings if they give to the company an address to which the notices can be sent (see note to Clause 113).

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BIBLIOGRAPHY

OF THE

"Handbook on the Formation, Management, and Winding Up of Joint Stock Companies."

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1st	Edition	Published	in	1866
2nd	"	"	"	1870
3rd	"	"	"	1873
4th	"	"	"	1874 (January).
5th	"	"	"	1875 (September).
6th	"	"	"	1878 (February).
7th	"	"	"	1881 (January).
8th	"	"	"	1884 (January).
9th	"	"	"	1885 (January).
10th	"	"	"	1886 (March).
11th	"	"	"	1887 (October).
12th	"	"	"	1888 (July).
13th	"	"	"	1890 (January).
14th	"	"	"	1891 (April).
15th	"	"	"	1892 (March).
16th	"	"	"	1893 (March).
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Translated into French by G. GIRAUDET
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26th	Published	"	1904 (December).
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"	Adapted to South African Company Law and Practice by L. O. P. PYEMONT, B.A., LL.B., Advocate of the Supreme Court of the Colony of the Cape of Good Hope, and published in Cape Town in December, 1906.		
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NOMINAL SHARE CAPITAL.	<i>Ad Valorem</i> Duty on Statement of Capital.		Fee Stamp on Memorandum of Association.		TOTAL DUTY AND FEES.
£100	£1 0	..	£2 0	..	£5 0
250	3 0	..	2 0	..	7 0
500	5 0	..	2 0	..	9 0
1,000	10 0	..	2 0	..	14 0
1,500	15 0	..	2 0	..	19 0
2,000	20 0	..	2 0	..	24 0
3,000	30 0	..	3 0	..	35 0
4,000	40 0	..	4 0	..	46 0
5,000	50 0	..	5 0	..	57 0
6,000	60 0	..	5 5	..	67 5
7,000	70 0	..	5 10	..	77 10
8,000	80 0	..	5 15	..	87 15
9,000	90 0	..	6 0	..	98 0
10,000	100 0	..	6 5	..	108 5
11,000	110 0	..	6 10	..	118 10
12,000	120 0	..	6 15	..	128 15
13,000	130 0	..	7 0	..	139 0
14,000	140 0	..	7 5	..	149 5
15,000	150 0	..	7 10	..	159 10
16,000	160 0	..	7 15	..	169 15
17,000	170 0	..	8 0	..	180 0
18,000	180 0	..	8 5	..	190 5
19,000	190 0	..	8 10	..	200 10

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NOMINAL SHARE CAPITAL.	Ad Valorem Duty on Statement of Capital.	Fee Stamp on Memorandum of Association.	TOTAL DUTY AND FEES.
£20,000	£200 0	£8 15 ..	£210 15
25,000	250 0	10 0 ..	262 0
30,000	300 0	11 5 ..	313 5
35,000	350 0	12 10 ..	364 10
40,000	400 0	13 15 ..	415 15
45,000	450 0	15 0 ..	467 0
50,000	500 0	16 5 ..	518 5
60,000	600 0	18 15 ..	620 15
70,000	700 0	21 5 ..	723 5
75,000	750 0	22 10 ..	774 10
80,000	800 0	23 15 ..	825 15
90,000	900 0	26 5 ..	928 5
100,000	1,000 0	28 15 ..	1,030 15
150,000	1,500 0	31 5 ..	1,533 5
200,000	2,000 0	33 15 ..	2,035 15
250,000	2,500 0	36 5 ..	2,538 5
300,000	3,000 0	38 15 ..	3,040 15
350,000	3,500 0	41 5 ..	3,543 5
400,000	4,000 0	43 15 ..	4,045 15
450,000	4,500 0	46 5 ..	4,548 5
500,000	5,000 0	48 15 ..	5,050 15
525,000	5,250 0	50 0 ..	5,302 0
600,000	6,000 0	50 ..	6,052 0
700,000	7,000 0	50 ..	7,052 0
800,000	8,000 0	50 ..	8,052 0
900,000	9,000 0	50 ..	9,052 0
1,000,000	10,000 0	50 ..	10,052 0

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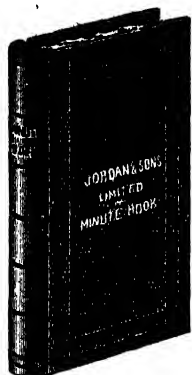
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88A	• Ditto (30 Names—10 Returns) <i>F^ocap</i>	13/-	23/-
89	Ditto (120 Names—10 Returns) <i>Demy</i>	30/-	40/-
89A	Ditto (80 Names—10 Returns) <i>F^ocap</i>	15/-	25/-
90	Ditto (160 Names—10 Returns) <i>Demy</i>	35/-	45/-
90A	Ditto (120 Names—10 Returns) <i>F^ocap</i>	18/6	28/6
91	Ditto (200 Names—10 Returns) <i>Demy</i>	41/6	51/6
91A	Ditto (180 Names—10 Returns) <i>F^ocap</i>	23/6	33/6
92	Numerical Register of Shares (numbered 1 to 1000)	18/6	30/-
92A	Ditto (numbered 1 to 1500)	22/6	32/6
93	Ditto (numbered 1 to 2000)	26/6	36/6
93A	Ditto (numbered 1 to 2500)	30/-	40/-
94	Ditto (numbered 1 to 3000)	33/6	43/6
94A	Ditto (numbered 1 to 3500)	37/6	47/6
95	Ditto (numbered 1 to 4000)	42/-	52/-
96	Ditto (numbered 1 to 5000)	50/-	60/-
106	Shareholders' Address Book (78 Pages)	13/-	23/-
107	Ditto (Alphabetical) (78 Pages)	15/-	25/-
112	Register of Returns of Allotments (10 Returns. 68 Pages)	12/-	22/-
112A	Ditto Cloth, 7/6	—	—
115	Register of Directors or Managers	13/-	23/-
115A	Ditto Cloth, 7/6	—	—
118A	Directors' Attendance Book .. Quarto, Limp Roan, 9/6	—	—
118B	Ditto Octavo, ditto 6/6	—	—
121	Register of Debentures (39 Folios)	13/-	23/-
121A	Ditto (23 Folios) ... Cloth, 7/6	—	—
122	Register of Debenture Holders (with Interest Account at foot of each page). (38 Accounts)	15/-	25/-
123	Register of Debentures (39 Folios), with Register of Transfers	15/-	25/-
124	Register of Transfers of Debentures (39 Folios)	13/-	23/-
125	Register of Debenture Holders (78 Accounts)	13/-	23/-
126	Ditto (with Register of Transfers of Debentures)	15/-	25/-
127	Register of Debenture Stock Holders (78 Accounts)	13/-	23/-
128	Ditto (with Register of Transfers)	15/-	25/-
129	Register of Transfers of Debenture Stock (39 Folios)	13/-	23/-
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202A	Ditto (95 Folios), treble cash ruling ...	7/6	—
203	Ditto (143 Folios), double cash ruling Second quality	8/9	—
204	Ditto (191 Folios), double cash ruling Second quality	10/-	—
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228	Ditto (162 Pages and Index) Second quality	7/6	—
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229A	Ditto (330 Pages and Index) Second quality	10/-	—
234	Investors' Account Book, comprising Cash Book, Investment Ledger and Register of Dividends, General Ledger, Annual Summary of Investments, Memoranda, Address Book and Index ... (Size of page 9 1/4" x 7 1/4")	21/-	—

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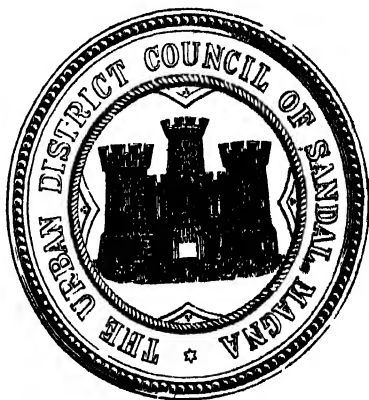
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SEALS

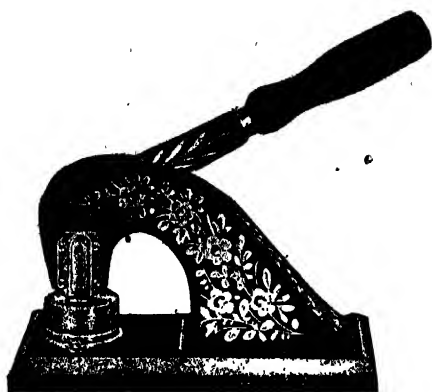
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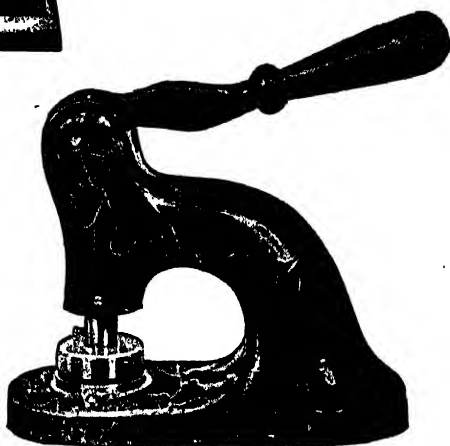
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